DOCKET

No. 07-1529 *** CAPITAL CASE ***
Title: Jesse Jay Montejo, Petitioner
v.
Louisiana
Docketed: June 9, 2008
Lower Ct: Supreme Court of Louisiana
Case Nos.: (2006-KA-1807)
Decision Date: January 16, 2008
Rehearing Denied: March 7, 2008
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jun 5 2008	Petition for a writ of certiorari filed. (Response due July 9, 2008)
Jul 9 2008	Brief of respondent Louisiana in opposition filed.
Jul 22 2008	Reply of petitioner Jesse Jay Montejo filed.
Jul 23 2008	DISTRIBUTED for Conference of September 29, 2008.
Oct 1 2008	Petition GRANTED.
Nov 7 2008	SET FOR ARGUMENT ON Tuesday, January 13, 2009.
Nov 17 2008	Brief of petitioner Jesse Jay Montejo filed.
Nov 17 2008	Joint appendix filed. Statement of costs received.
Nov 24 2008	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Nov 24 2008	Brief amicus curiae of Louisiana Public Defenders Association filed.
Nov 24 2008	Brief amici curiae of National Legal Aid & Defender Association, et al. filed.
Nov 28 2008	CIRCULATED.
Nov 29 2008	Motion for divided argument filed by respondent Louisiana.
Dec 15 2008	Motion for divided argument filed by respondent DENIED.
Dec 17 2008	Brief of respondent Louisiana filed. (Distributed)
Dec 24 2008	Brief amici curiae of New Mexico, et al. filed. (Distributed)
Jan 6 2009	Reply of petitioner Jesse Jay Montejo filed. (Distributed)
Jan 8 2009	Record received from the Supreme Court of Louisiana. (2 boxes) This reord contains sealed documents
Jan 13 2009	Argued. For petitioner: Donald B. Verrilli, Jr., Washington, D.C. For respondent: Kathryn W. Landry, Baton Rouge, La.

~~Name~~~~~~~~~~~~~~~~~~~~~	~~~~~~~Address~~~~~~~~~~~~~~~~~~	~~Phone~~~
Attorneys for Petitioner:		
Donald B. Verrilli Jr.	Jenner & Block LLP	(202) 639-6000
Counsel of Record	1099 New York Avenue, N.W. Suite 900 Washington, DC 20001 dverrilli@jenner.com	

Party name: Jesse Jay Montejo

Attorneys for Respondent:

Kathryn Landry Counsel of Record	P.O. Box 82659 Baton Rouge, LA 70884-2659 klandry@ieyoublandry.com	(225)-766-0023

Party name: Louisiana

Other:

Catharine F. Easterly	Public Defender Service for the District of Columbia 633 Indiana Avenue, NW Washington, DC 20004	(202) 628-1200

Party name: National Legal Aid & Defender Association, et al.

Jonathan L. Marcus	Covington & Burling, LLP 1201 Pennsylvania Avenue, NW Washington, DC 20004	(202) 662-5892

Party name: National Association of Criminal Defense Lawyers, et al.

G. Paul Marx	Louisiana Public Defenders Association P.O.Box 82394 Lafayette, LA 70598	(337) 237-2537

Party name: Louisiana Public Defenders Association

M. Victoria Wilson	Assistant Attorney General New Mexico Attorney General's Office 111 Lomas Blvd., NW Albuquerque, NM 87102	(505) 222-9061

Party name: New Mexico, et al.

PETITION
FOR
WRIT OF
CERTIORARI

94

Supreme Court, U.S.
FILED
071529 JUN 5 - 2008
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No. ①

IN THE
Supreme Court of the United States

JESSE JAY MONTEJO
Petitioner,

v.

STATE OF LOUISIANA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

JELPI P. PICOU
G. BEN COHEN
THE CAPITAL APPEALS
PROJECT
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955

DONALD B. VERRILLI, JR.
Counsel of Record
MARIN K. LEVY*
JENNER & BLOCK LLP
1099 New York Ave. N.W.
Suite 900
Washington, D.C. 20001
(202) 639-6000

* Not admitted in D.C.; supervised by principals of the firm

Counsel for Petitioner

CAPITAL CASE

QUESTION PRESENTED

When an indigent defendant's right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to "accept" the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present?

PARTIES TO THE PROCEEDING

The petitioner is Jesse Jay Montejo, the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jesse Jay Montejo respectfully petitions for a writ of certiorari to review the judgment of the Louisiana Supreme Court in this case.

OPINION BELOW

The opinion of the Louisiana Supreme Court is reported at 974 So. 2d 1238 (La. 2008), and is reprinted in the Appendix at Pet. App. 1a-59a.

JURISDICTION

The opinion of the Louisiana Supreme Court was entered on January 16, 2008. That court denied Montejo's timely petition for rehearing on March 7, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI. The Sixth Amendment is applicable to the states through the Fourteenth Amendment.

STATEMENT OF THE CASE

A. *Introduction*

The present case raises an issue left unresolved by this Court's Sixth Amendment jurisprudence: When an indigent defendant's right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to "accept" the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present?

In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court held that once a defendant asserts his right to counsel at an arraignment or similar proceeding, any waiver of that right during subsequent police-initiated interrogation without counsel present is presumed invalid unless the accused initiates communication. *Id.* at 633. Two years later, in *Patterson v. Illinois*, the Court held that where the right to counsel has attached but an unrepresented defendant has not requested counsel, nor "retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities," the authorities may initiate interrogation. *Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988).

The question these decisions leave unaddressed — whether an indigent defendant who has been appointed counsel must take additional affirmative steps to "accept" that appointment — has divided the lower courts. The majority rule in the States that have considered the issue is the sensible one — that a defendant who has been appointed counsel need not take any additional steps to secure the protections of the Sixth Amendment. That is also the view of the Eleventh Circuit. In conflict with these decisions, the Louisiana Supreme Court followed the rule applicable in the Fifth Circuit, which provides that a defendant who has been appointed counsel cannot invoke the protections of *Michigan v. Jackson* unless the defendant has previously done something affirmatively to "accept" the appointment. As will be shown, the Louisiana Supreme Court's Sixth Amendment ruling is manifestly appropriate for plenary review.

B. *Factual Background*

On September 6, 2002, Jesse Jay Montejo was approached by Gretna, Louisiana police officers for questioning in connection with a murder investigation. There is some dispute as to the nature of the encounter – Gretna police officers assert that they asked Montejo to accompany them to the police station, R. 2568, 2574 (Trial Tr. March 7, 2005), whereas Montejo testified that he was pulled from his vehicle at gunpoint, thrown to the ground, and handcuffed. R. 2778 (Trial Tr. March 8, 2005).

According to Montejo's testimony at trial, he asked detectives during his initial detention in Gretna if he could have a lawyer present but they told him they would not recommend that — a fact the Louisiana Supreme Court noted and did not question. Pet. App. 10a n.19. Specifically, Montejo stated that after being taken into a room and handcuffed to the wall, the detectives

> walked in the room and they told me, Oh, we just wanted you for questioning, you're not

> under arrest, though. And at that time, I told them....Can I please leave? He is like, well, we have some questions we want to ask you. And I informed him at that time I don't want to talk to nobody, I don't have no information for nobody, for nothing under any circumstances, can I please leave. Like, no. I said, Well, can I have a lawyer? He said, Well, I wouldn't advise that, because right now, you know, we need to question you about some serious matters. And at that time, I told him, Well, I am allowed to have a lawyer present, ain't I? He's like, Yes, but we wouldn't really recommend that.

R. 2779 (Trial Tr. March 8, 2005).

Following his initial detention, Montejo was transferred to the St. Tammany Parish Sheriff's Office for questioning. Police officers interviewed him from 4:30pm until 11pm on the evening of the 6th, and again between 3am and 4am the next morning. Pet. App. 9a. Roughly four hours of the interrogation was videotaped. *Id.* The tapes show Montejo first denying any involvement in the crime, but eventually stating that he was at the victim's house with an unidentified black male who robbed and shot the victim. *Appellant's Br. at 17, available at* 2007 WL 4560160. The detectives were unconvinced that Montejo played only an indirect role in the crime and pressed him:

> Q: (Shouting): "Are you sorry for shooting that man?"
>
> A: "I didn't shoot him."
>
> Q: "Yes you did."

A: "I did - not - shoot - that - man."

State's Ex. 14-B (DVD version of the video taped statement). At this point, Montejo invoked his right to counsel: "I did not kill that man, I did not break in, I did not steal anything. I would like to answer no more questions unless I'm in front of a lawyer." *Id.*

Following Montejo's request for counsel, the detectives interrogating him switched tactics in an effort to pressure him to revoke his request. One of the detectives declared: "You are under arrest for first degree murder." Pet. App. 14a. They then told Montejo in no uncertain terms that it was not in his interest to invoke the right to counsel:

> Detective Major: . . . "Dude, you don't want to talk to us no more, you want a lawyer, right? I trusted you and you let me down."
>
> Montejo: "No, come here, come here."
>
> Detective Major: "No, no, I can't."
>
> Montejo: "No, come here..."
>
> Detective Major: "No, you've asked for an attorney, and you are getting your charge. And the shame of it is..."

Pet App. 15a. Montejo then relented and the interrogation resumed. *Id.*

The Louisiana Supreme Court noted that "[t]he video recorder was turned off at this point and did not begin again until approximately 10 minutes later." *Id.* When video recording resumed, Montejo was "visibly upset." *Id.* at 16a. The detectives stated on the video that Montejo was "not interviewed during the preceding untaped interval" and that "he understood his rights and wished to continue the interview in the absence of counsel." *Id.*

After questioning resumed, Montejo described another version of the crime in which he implicated himself, saying that he shot the victim during a botched burglary. *Id.* When the police probed this account, he retracted his story and insisted that he would not "take the rap" for something he did not do. State's Ex. S-17 A (DVD of the 2nd interview with Jesse J. Montejo). The detectives then decided to end the interrogation. *Id.* Montejo was booked on a first degree murder charge shortly after midnight and then returned to a holding cell until just after 3am, when he was subjected to additional questioning. R. 2350 (Trial Tr. March 6, 2005).

On the morning of September 10, 2002, Montejo went before a St. Tammany Parish judge for a "seventy-two hour hearing."[1] At the hearing, his request for bond was denied, and he was remanded into state custody and formally appointed counsel through the Office of the Indigent Defender. Pet.

---

[1] Article 230.1, Section A of the Louisiana Code of Criminal Procedure requires the following:

> The sheriff or law enforcement officer having custody of an arrested person shall bring him promptly, and in any case within seventy-two hours from the time of the arrest, before a judge for the purpose of appointment of counsel...However, upon a showing that the defendant is incapacitated, unconscious, or otherwise physically or mentally unable to appear in court within seventy-two hours, then the defendant's presence is waived by law, and a judge shall appoint counsel to represent the defendant within seventy-two hours from the time of arrest.

La. Code Crim. Proc. Ann. art. 230.1(A).

App. 63a-64a. Nothing in the record indicates that Montejo was asked during the hearing whether he "accepted" the lawyer that had been appointed to represent him. Nor does the record indicate that he was otherwise made aware that he needed to "accept" the appointment in order to secure his Sixth Amendment rights.

Despite the fact that Montejo had appointed counsel, police detectives returned to question him later on September 10, 2002, asking Montejo to accompany them to search for the discarded murder weapon. R. 2582-83 (Trial Tr. March 7, 2005). Montejo responded by telling the officers that he was represented by counsel:

> They asked me if I would come with them to go clear up where I threw the gun at. So I said, Well, and I don't, I don't, I don't really want to go with you. He said, Do you have a lawyer? I said, yeah, I got a lawyer appointed to me.

Pet. App. 49a; R. 2787 (Trial Tr. March 8, 2005). Rather than terminate the interview and verify whether Montejo had a lawyer, the detectives pressed on (as they had in their previous interrogations) to obtain further testimony. In this instance, they told Montejo (falsely) that he did not have a lawyer. As Montejo testified:

> He said, No, no, you don't. I said, Yeah, I think I got a lawyer appointed to me, and I guess that's where I messed up, when I said I think I got a lawyer appointed to me. He said, No, you don't. He said, I checked, you don't have a lawyer appointed to you.

Pet. App. 49a; R. 2787. At that point, the police gave Montejo another set of *Miranda* warnings, Pet. App. at 21a, and began interrogating him again. He subsequently signed a statement asserting that he was voluntarily accompanying the police officers. State's Ex. 75.

During the car ride, Montejo wrote a letter — with pen and paper provided by detectives — to the victim's wife expressing remorse for his involvement in the murder. Pet. App. 20a-21a; State's Ex. 76. At trial, Montejo testified that detectives pressured him into writing the letter and that one detective in particular dictated much of the letter's content as he sat next to Montejo. R. 2790-91 (Trial Tr. March 8, 2005). After Montejo was directed to write the letter, the detectives eventually ended the venture as they were unable to determine the location of the murder weapon. Pet. App. 20a-21a n.44.

The detectives returned Montejo to the St. Tammany jail that evening, whereupon they were met by Montejo's lawyer, who was irate that his client had been questioned without notice to him. R. 2724-25 (Trial Tr. March 8, 2005).

On October 24, 2002, Montejo was indicted, along with a co-defendant, on one count of capital murder. R. 0123. Defense counsel sought to have the letter excluded from evidence on the ground that it was procured in violation of the Sixth Amendment, but the trial court ruled it to be admissible after a suppression hearing. Pet. App. 21a-22a. It was admitted at trial during the testimony of one of the detectives.

C. *Proceedings Below*

The guilt phase of Montejo's trial began on March 5, 2005. R. 2234. Four days later, the jury returned a verdict of guilty of first degree murder. R. 2913. The penalty phase of the trial began the following morning and was completed before noon, with the defense case comprising a total of four pages of transcript. R. 2938-42. The jury returned with a sentence of death, R. 2973, and the trial court formally sentenced Montejo to death on May 13, 2005. Pet. App. 69a.

Montejo appealed his conviction and sentence to the Louisiana Supreme Court. Among his allegations of error, Montejo contended that statements made during his initial interrogation on September 6th and 7th after Montejo requested counsel were obtained in violation of the Fifth Amendment, *Appellant's Br. at i-iii, available at* 2007 WL 4560160, and that introduction of the letter written during the September 10th car ride violated the Sixth Amendment. *Id.* at 21. With respect to the latter claim (which is the issue presented in this petition) Montejo asserted that his right to counsel attached at the Seventy-Two Hour Hearing and that the subsequent interrogation constituted a "'critical stage' proceeding." *Id.* Because he had appointed counsel, Montejo asserted, the police-initiated interrogation on September 10th violated *Michigan v. Jackson.* Montejo further argued that he never validly waived his right to counsel prior to producing the handwritten letter, in part because he had been falsely told by the interrogating officers that no lawyer had been appointed to represent him. *Id.* at

24-25. Accordingly, he contended, the introduction of the letter into evidence violated the Sixth Amendment and necessitated a new trial. *Id.* at 27.

On January 16, 2008, the Louisiana Supreme Court affirmed. Pet. App. 58a-59a. The court recognized the police tactics used during the September 6th and 7th interrogations presented a close question under the Fifth Amendment. Montejo's request for counsel was "unequivocal and unambiguous." Pet. App. 32a. And the officers' efforts to pressure him to revoke that request "merit[ed] close scrutiny" because they could be construed as an attempt to elicit a response. *Id.* at 34a. The court further noted the "hectoring" tone of one of the detectives. *Id.* at 35a. Finally, the court noted that the defendant was visibly distraught and tired throughout the numerous hours of interrogation. *Id.* at 40a. The court nevertheless concluded that Montejo's agreement to resume interrogation was a valid waiver. *Id.* at 42a.

Turning to the Sixth Amendment issue, the court agreed that Montejo's "right to counsel attached at the 72-hour hearing held on the morning of September 10, 2002, at which time indigent defense counsel was appointed to represent him." *Id.* at 47a. The court also acknowledged that the minute entry memorializing the hearing (no transcript of the proceeding was made) unambiguously indicated that counsel was appointed to represent Montejo. *Id.* The court noted, however, that the minute entry "[did] not show a response by defendant," and that "[t]he State allege[d] that the defendant simply stood mute at this hearing and defendant does not allege that he made any statement at this hearing asserting his right to counsel." *Id.* The court then ruled that "something more than the mere mute acquiescence in the appointment of counsel is necessary to show the defendant has asserted his right to sufficiently trigger the enhanced protection provided by *Michigan v. Jackson*'s prophylactic rule." *Id.* (internal quotation marks omitted). Thus, the court held that although Montejo's "right to counsel had attached, he did not assert his right to counsel such that the prophylactic rule of *Michigan v. Jackson* would invalidate any waiver he would later make." *Id.*

In reaching this result, the court did not appear to consider that the record contained no indication that Montejo was asked at the hearing by the presiding magistrate whether he "accepted" the appointment of counsel, nor did it contain any suggestion that he was told he would lose his Sixth Amendment rights unless he affirmatively "accepted" the appointment. Further, the court gave no consideration to the fact that Montejo, by the time of the Seventy-Two Hour Hearing, might well have feared affirmatively asking for a lawyer, given the treatment he had received from the authorities holding him in custody when he had asked for a lawyer previously. Finally, the court held that Montejo had validly waived his Sixth Amendment rights in response to police-initiated interrogation notwithstanding that the interrogating officers had falsely informed him that no lawyer had been appointed to represent him, thus creating the impression that he had no lawyer to consult prior to the interrogation.

After rejecting Montejo's Fifth and Sixth Amendment claims, the Louisiana Supreme Court affirmed his conviction and death sentence. *Id.* at 58a. Montejo's timely petition for rehearing was denied March 7, 2008. *Id.* at 1a.

REASONS FOR GRANTING THE WRIT

In this case, the Louisiana Supreme Court upheld the admissibility of statements Petitioner Montejo made in response to police-initiated interrogation that occurred after Montejo had been appointed counsel at an initial hearing. According to the Louisiana Supreme Court, Montejo could not claim the protections of the Sixth Amendment rule of *Michigan v. Jackson* – which bars police-initiated interrogation in the absence of counsel after a defendant has counsel – because Montejo did not take any affirmative steps to "accept" the counsel that had been appointed to represent him. The Louisiana Supreme Court then went on to hold that Montejo made a free and voluntary choice to proceed without his appointed counsel, notwithstanding that the police who initiated interrogation falsely told Montejo that no lawyer had been appointed for him when pressuring him to making the incriminating statements that were later used against him at trial.

Certiorari should be granted to review the Louisiana Supreme Court's Sixth Amendment decision. The court's ruling that a criminal defendant who has been appointed counsel at an initial hearing must take additional affirmative steps to "accept" the appointment conflicts with the decisions of at least four other state courts of last resort (as well as the Eleventh Circuit) and is impossible to reconcile with this Court's Sixth Amendment jurisprudence.

The decision below is certain to lead to a proliferation of factual controversies over what constitutes "acceptance" and whether or not such "acceptance" occurred in every case in which a defendant with appointed counsel has been subjected to police-initiated interrogation (particularly given that most States do not transcribe initial hearings at which counsel is appointed). The issue is one that recurs frequently and for which a clear, administrable rule is manifestly necessary. The issue is squarely presented on the record below. Thus every consideration favors plenary review.

I. THE LOUISIANA SUPREME COURT'S DECISION CONFLICTS WITH THE DECISIONS OF FOUR OTHER STATE COURTS OF LAST RESORT AND THE ELEVENTH CIRCUIT

A. The Louisiana Supreme Court's Decision Conflicts With The Decisions Of Four State Courts Of Last Resort.

The Louisiana Supreme Court's decision squarely conflicts with the decisions of at least four other state courts of last resort, all of which have rejected the argument that a defendant must affirmatively act to "accept" counsel by appointment so as to bar subsequent state-initiated interrogation.

In *State v. Dagnall*, 612 N.W.2d 680 (Wis. 2000), the Wisconsin Supreme Court addressed the question of whether one must take affirmative steps to "invoke" the right to counsel to give it effect, even after an attorney has been "retained." *Id.* at 683. In that case, the defendant's Sixth Amendment right to counsel had attached, but he had not affirmatively "invoked" counsel. *Id.* Unlike the present case, defense counsel had been retained rather than appointed. The Wisconsin Supreme Court deemed that distinction immaterial. *Id.* at 695.

The Wisconsin Supreme Court noted that this Court's holding in *McNeil v. Wisconsin*, 501 U.S. 171, 175-79 (1991) "crystallize[d] the Court's view that a charged defendant in custody who does not have counsel must invoke, assert, or exercise the right to counsel to prevent interrogation." 612 N.W.2d at 693. But the court in *Dagnall* refused to "read *McNeil* to require an accused defendant *who has an attorney for the crime charged*" to take any additional affirmative steps to preclude police-initiated interrogation. *Id.* (emphasis in original). The court explained that it saw

> nothing in *McNeil* that forces such a defendant to *reassert* the Sixth Amendment right to counsel to quash police-initiated questioning about the crime charged. *McNeil* does not repudiate the unambiguous declaration that "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." *Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988).

Id.

The court also stated unambiguously that the same rule would apply to defendants who had received appointed counsel:

> [The defendant] did not have to invoke his right because he already had counsel. To require an accused person to assert the right to counsel after the accused has counsel would invite the government to embark on a persistent campaign of overtures and blandishments to induce the accused into giving up his rights. This would be inconsistent with both the letter and the spirit of our law.
>
> Even if Sixth Amendment doctrine now requires some invocation of the right to counsel before an accused retains an attorney, we think the formality of either appointing counsel or retaining counsel serves to invoke the right.

Id. at 695.

The Arkansas Supreme Court reached the same conclusion in *Bradford v. State*, 927 S.W.2d 329 (Ark. 1996).[2] In *Bradford* — as in this case — the police initiated a post-indictment interrogation of a defendant for whom counsel had been appointed at an initial hearing. Although Bradford signed a *Miranda* waiver before making incriminating statements, the Arkansas Supreme Court concluded that such a waiver was insufficient to overcome the defendant's Sixth Amendment right. *Id.* at 334. The court reasoned:

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[2] The Arkansas Supreme Court overruled an earlier decision by the Arkansas Court of Appeals to reach its decision. As the Court stated:

> It should be noted that the Arkansas Court of Appeals has recently held that the mere appointment of counsel is not enough. Rather, there must be affirmative invocation of the right to counsel in order to invalidate a later confession. *See Lanes v. State*, 53 Ark.App. 266, 922 S.W.2d 349 (1996). That demission is in direct conflict with our decision today. Accordingly, we overrule *Lanes v. State* on that point.

Bradford v. State, 927 S.W.2d at 335.

> We read *Michigan v. Jackson* to stand for the proposition that once the Sixth Amendment right to counsel attaches and once the defendant requests counsel, an ordinary waiver of *Miranda* rights will not suffice to validate a subsequent confession. The same principle should apply to appointed counsel, which is the situation that we have before us.

Id. As the court continued, "[t]hough Bradford never formally requested counsel, the court's appointment provided a medium between herself and investigating officers. Her mere waiver of *Miranda* rights could not equate to a waiver of appointed counsel, a fact of which she was unaware." *Id.* at 335.

The Arkansas Supreme Court distinguished this Court's decision in *Patterson*:

> The critical fact, though, that did not exist in *Patterson* but exists in the instant case is that counsel had already been appointed for Bradford, and under *Michigan v. Jackson, supra,* knowledge of that fact was imputed to the police officers. The failure of police officers to learn about the appointment and obtain a statement from Bradford that she did not want appointed counsel present at the interrogation is what requires suppression in this case.

Id. at 334. The *Bradford* court thus not only endorsed the view that an affirmative invocation is unnecessary once counsel has been appointed; it went one step further by stating that *Jackson* places an affirmative burden on the state actor to determine whether counsel has already been appointed.[3]

The Louisiana Supreme Court's decision in this case also conflicts with the decision of the Texas Court of Criminal Appeals in *Holloway v. State*, 780 S.W.2d 787 (Tex. Crim. App. 1989), a case decided on summary remand from this Court in light of *Michigan v. Jackson*. Holloway was arrested, indicted, and appointed counsel all on the same day. *Id.* at 788-89. Though Holloway was not present when the court appointed him counsel, his lawyer visited him at the jail the same day and instructed Holloway not to submit to questioning. *Id.* at 789. The following day, police initiated an interrogation with Holloway, in the absence of his lawyer. *Id.* Holloway was read his *Miranda* rights and signed a waiver form before making inculpatory statements that were later used against him at trial. *Id.*

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[3] The Arkansas Attorney General filed a petition for certiorari to this Court on this very issue. Specifically, the Arkansas Attorney General presented the following question:

> Does the Sixth Amendment to the United States Constitution or this Court's decision in *Michigan v. Jackson*, 475 U.S. 625 (1986), prohibit police-initiated questioning of indigent criminal defendants after arraignment or other similar proceeding when those defendants have never requested counsel or otherwise indicated a desire to have counsel present, but who nevertheless have had counsel appointed for them?

See generally Pet. for Cert. at i, *Arkansas v. Bradford*, No. 96-556 (U.S. filed Sept. 30, 1996), *available at* 1996 WL 33422328. Review was denied. *Arkansas v. Bradford*, 519 U.S. 1028 (1996).

The court in *Holloway* did not apply *Jackson*, because Holloway never requested counsel. *Id.* Even so, after engaging in an analysis of this Court's holdings in *Moulton* and *Patterson*, the Texas court held that Holloway's confession was obtained in violation of his Sixth Amendment right to counsel and that the trial court erred in refusing to suppress it. *Id.* at 796. In coming to this conclusion, the court reasoned:

> Given the Supreme Court's express limitation of its holding in *Patterson* to unrepresented defendants, see 108 S.Ct. at 2393 n.3, and its warning that a represented defendant would be differently situated, see 108 S.Ct. at 2397 n.9, coupled with the Court's consistent precedent barring deliberate police efforts to elicit incriminating statements in the absence of counsel when the accused is represented, we can find no room for the State's argument that the Supreme Court would permit the police-initiated interrogation of an indicted accused who has retained or has been appointed defense counsel.

Id. at 795. Thus, the court held that "where a relationship between the accused and his attorney is established after the Sixth Amendment has become applicable, the Sixth Amendment precludes dissolution of that relationship in the absence of counsel." *Id.*

Finally, the District of Columbia Court of Appeals addressed a similar issue in *Dew v. United States*, 558 A.2d 1112 (D.C. 1989). The defendant was indicted and appointed counsel, but failed to appear for his arraignment. *Id.* at 1114. The *Dew* court accordingly held that there was an unresolved question of fact about whether the defendant's right to counsel "expire[d]" when he failed to make an initial appearance (as this would have been the first time he would have been informed of the charges and his right to counsel). *Id.* at 1113. The court observed, however, that it found "little, if any, room for an argument that the Supreme Court would permit a police-initiated request for a post-indictment waiver of counsel by a represented defendant, except through defense counsel." *Id.* at 1116. The *Dew* court pointed to this Court's "express limitation of its holding in *Patterson* to unrepresented defendants," as well as the "Court's consistent precedent barring deliberate police efforts to elicit incriminating statements in the absence of counsel when the suspect is represented." *Id.*

The rule in Louisiana previously conformed to the majority rule set forth in the cases discussed above. Specifically, in *State v. Hattaway*, 621 So. 2d 796 (La. 1993), the Louisiana Supreme Court held that after the first adverse criminal proceeding and the court's appointment of an attorney, the State cannot obtain a waiver from the accused or otherwise communicate with him with respect to his offense except through counsel. *Id.* at 798, 807. Two years later, however, the court overruled itself in *State v. Carter*, finding that "*Hattaway*'s holding that right to counsel could not be waived after counsel had been appointed at the initial hearing was too broad because it was based on United States Supreme Court jurisprudence that dealt only with covert interrogation of a defendant." Pet. App. 45a, discussing *State v. Carter*, 664 So. 2d 367, 374 (La. 1995). Accordingly, the Louisiana Supreme Court has placed itself in opposition to the prevailing rule that a defendant who has been appointed counsel need not take any additional affirmative steps to activate the protections of the Sixth Amendment.

The *Montejo* court made clear that, in its view, an affirmative statement or action of "acceptance" is required to activate the protections of the Sixth Amendment: "As we held in *Carter*, '[s]omething more than the mere mute acquiescence in the appointment of counsel is necessary to show the defendant has asserted his right to counsel [to] sufficiently trigger the enhanced protection provided by *Michigan v. Jackson*'s prophylactic rule.'" Pet. App. 47a, citing *Carter*, 664 So. 2d at 383. The Louisiana Supreme Court did not, however, provide any guidance as to what would suffice to constitute an affirmative act of "acceptance."

In reaching this conclusion, the Louisiana Supreme Court followed the Fifth Circuit's decision in *Montoya v. Collins*, 955 F.2d 279 (5th Cir. 1992), in which "the Fifth Circuit held that not every appointment of counsel by a committing magistrate to protect the accused's interests constitutes a request for, or an assertion of, the right to counsel for purposes of *Michigan v. Jackson*." Pet. App. 47a n.68. Specifically, the court in *Montoya* found:

> The rule of *Jackson* is invoked by the defendant's "assertion...of the right to counsel." This language connotes an actual, positive statement or affirmation of the right to counsel. At no time did Montoya make such

> a statement or affirmation — as the state court found, he did not request counsel, and he said nothing at all when the magistrate appointed counsel for him. We do not say that by his silence Montoya "waived" any of his rights, for at any time subsequent to his appearance before the magistrate, including during his interrogation, Montoya could have asked to see a lawyer and *Jackson* would have barred any further police-initiated interrogation. Rather, Montoya never asserted, or invoked, his right to counsel in the first place....For purposes of *Jackson*, an "assertion" means some kind of positive statement or other action that informs a reasonable person of the defendant's "desire to deal with the police only through counsel."

Montoya, 955 F.2d at 282-83 (first ellipsis in original; footnote and citations omitted).

That the Louisiana Supreme Court would reach this conclusion on the present record is particularly surprising. There is no suggestion in the record that Montejo was ever asked by the presiding magistrate whether he wanted to "accept" the counsel that had just been appointed to represent him. Nor was there any suggestion that Montejo had been informed that a failure to "accept" counsel would waive his Sixth Amendment protections against police-initiated interrogation. Under those circumstances, Montejo's silence is hardly surprising.

Accordingly, the decision of the Louisiana Supreme Court cannot be reconciled with the decisions of the other four state courts of last resort to address whether an accused must do something more than be appointed representation before he can be said to have invoked the Sixth Amendment right to counsel.[4]

B. The Law Of The Eleventh Circuit Is Consistent With The Majority Rule In The State Courts And In Conflict With The Decision Below As Well As The Law Of The Fifth Circuit.

In *Stokes v. Singletary*, 952 F.2d 1567 (11th Cir. 1992), the Eleventh Circuit took the opposite approach from that of the Louisiana Supreme Court and the Fifth Circuit. The accused in *Stokes* was appointed an attorney at his first appearance, at which point his Sixth Amendment right to counsel was deemed to have attached. *Id.* at 1569. The accused maintained that he had requested counsel, but no record existed to corroborate his claim. *Id.* at 1579. The State asserted that no invocation was made during or subsequent to the initial appearance. *Id.* The police initiated contact with the accused without counsel present after the defendant's first appearance. *Id.* at 1569.

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[4] The Supreme Court of Florida in *Smith v. State*, 699 So. 2d 629 (Fla. 1997), similarly relied on the reasoning employed in *Montoya*. However, the *Smith* court addressed a different question: whether it could be said that the defendant "invoked" his right to counsel when, before the defendant was located and taken into custody, a public defender volunteered to act as the defendant's lawyer, without defendant's knowledge. *Id.* at 637-38. The *Smith* court held that the "mere appointment of an attorney at the attorney's request is not enough to invoke the right; the accused must invoke the right. *See Montoya v. Collins*, 955 F.2d 279 (5th Cir. 1992)." *Id.* at 639. Though the court did go on to note that an accused "invokes the right to counsel by statements that indicate a desire to deal with police only through counsel," it distinguished an earlier case in which a public defender was appointed to represent the defendant at a first appearance after arrest, and at which the defendant physically appeared. *Id.* The court wrote: "This is in contrast to the events which occurred in this case, in which Smith did not appear when counsel was summarily appointed and did not invoke or accept the appointment of counsel." *Id.* at 640. Thus, though the *Smith* court did not definitively weigh in on the question at hand, the Florida decision clearly demonstrates confusion among the lower courts generally.

The Eleventh Circuit rejected the State's theory that the defendant could not claim the protection of the Sixth Amendment because he had yet to invoke the right to counsel. Instead, the court found the "dispute concerning Stokes's request for counsel at his initial appearance to be a distinction without a difference." *Id.* at 1579. As the court reasoned, "[i]rrespective of Stokes's request for an attorney, he had appointed counsel, which knowledge was imputed to the investigating officers." *Id.* The Eleventh Circuit ultimately held that *Jackson* was inapplicable, because Stokes's conviction had become final prior to this Court's decision in *Michigan v. Jackson. Id.* at 1579 n.12. The court therefore found that the relevant issue was whether Stokes had subsequently waived his right to counsel under *Brewer*, which required additional findings, and the court accordingly remanded the case. *Id.* at 1581.

Nevertheless, the Eleventh Circuit's adoption of the majority rule on this issue further justifies a grant of certiorari to review the Louisiana Supreme Court's contrary ruling.

II. THE LOUISIANA SUPREME COURT'S ANALYSIS CANNOT BE RECONCILED WITH THIS COURT'S SIXTH AMENDMENT PRECEDENT

This Court has never suggested that an accused who has already been appointed counsel must take additional affirmative steps to "accept" the appointment in order to activate the protections of the Sixth Amendment. To the contrary, the Court has drawn a dividing line between those who have a lawyer or requested one, and those who have no counsel and have not expressed their desire to obtain one. *See Michigan v. Harvey*, 494 U.S. 344, 352 (1990) ("To be sure, once a defendant obtains or even requests counsel as respondent had here, analysis of the waiver issues changes.") (emphasis added); *Patterson*, 487 U.S. at 290 n.3 ("We note as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect."). Thus, the reasoning of the Louisiana Supreme Court – that a defendant who has already been given a lawyer must somehow still invoke his right to have one – lacks any basis in this Court's Sixth Amendment jurisprudence.

Moreover, the logical underpinning of Louisiana's rule – that appointed counsel is not yet counsel to the accused because the accused must do something more to confirm representation – is impossible to reconcile with this Court's jurisprudence respecting the right of defendants to proceed pro se. In that context, the Court presumes that appointed counsel has been accepted by the defendant absent a clear and informed statement to the contrary from the defendant. Though a state cannot force counsel onto an unreceptive defendant, a defendant must affirmatively waive his right to counsel in order to proceed pro se. *See generally Faretta v. California*, 422 U.S. 806 (1975). Before a court can accept a defendant's waiver, the trial judge must make the accused "aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Id.* at 835 (internal quotation marks omitted). "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer." *Carnley v. Cochran*, 369 U.S. 506, 516 (1962). The burden is on the "[s]tate to prove an intentional relinquishment or abandonment of a known right or privilege" and "courts indulge in every reasonable presumption against waiver." *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (internal quotation marks omitted). Furthermore, this strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings. *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 238-40 (1973)). This presumption directly contradicts the starting point for the Louisiana Supreme Court — which is nothing less than a presumption from "silence" that the defendant has opted to act without counsel.

Also weighing against the Louisiana Supreme Court's decision is this Court's recognition in *Patterson v. Illinois* that although this Court had "permitted a *Miranda* waiver to stand where a suspect was not told that his lawyer was trying to reach him during questioning; in the Sixth Amendment context, this waiver would not be valid." 484 U.S. at 297 n.9. The *Patterson* Court was referencing *Moran v. Burbine*, 475 U.S. 412 (1986), in which the police failed to inform a preindictment defendant in their custody that a lawyer had called on his behalf. *Id.* at 415. The lawyer, who had been retained by the defendant's sister, was told by the police that her client would not be questioned for the rest of the day. *Id.* at 417. The police never informed the defendant that an attorney had been retained for him, *id.*, nor did he request counsel at any time. *Id.* at 415. Later that evening, the police Mirandized the defendant, had him sign a series of waivers, and then obtained a confession from him. *Id.* at 417-18. Ultimately, the Court held that this police conduct did not violate the Sixth Amendment right to counsel, because adversary judicial proceedings had not yet commenced, and thus the defendant's right had not yet attached. *Id.* at 432. The Court went on to acknowledge that "once the right *has* attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a medium between [the suspect] and the State' during the interrogation." *Id.* at 428 (internal quotation marks omitted).

Given the *Patterson* Court's recognition that the defendant in *Moran* would have been entitled to relief had his Sixth Amendment right to counsel attached, it is difficult to imagine that an accused who was present in court while a judge appointed counsel would not be afforded the same protection. And it is particularly egregious that the Louisiana Supreme Court would conclude that Montejo could and did validly waive his Sixth Amendment rights on this record. The right to counsel had attached and Montejo had indisputably been appointed a lawyer who was representing him at the time of the police-initiated interrogation. Worse yet, in order to gain Montejo's cooperation, the interrogating officers falsely told Montejo that no lawyer had been appointed to represent him. And all of this occurred against a backdrop of none-too-subtle police pressure that conditioned Montejo to believe that insisting on a lawyer's help would harm his prospects for leniency.

Accordingly, the Louisiana Supreme Court's failure to hold Montejo's waiver presumptively invalid cannot be reconciled with this Court's Sixth Amendment jurisprudence.

III. THE LOUISIANA SUPREME COURT'S "AFFIRMATIVE INVOCATION" TEST IS UNWORKABLE IN PRACTICE AND LOGICALLY UNSOUND

A bright-line rule barring the State from initiating interrogation with an accused after counsel has been appointed protects the "distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship." *Patterson*, 487 U.S. at 290 n.3. This "acceptance by appointment" rule has the additional advantage of being an easily administrable standard that provides clear guidance to the authorities and a clear test for judges deciding suppression motions. In contrast, the Louisiana Supreme Court's "affirmative invocation" rule is both impractical and logically unsound.

A. The Louisiana Supreme Court's Test Would Have Grave Practical Consequences.

Under the Louisiana Supreme Court's rule, whether a defendant's Sixth Amendment right has been invoked depends on what the defendant says or does not say directly after appointment. Though the Louisiana Supreme Court noted that the defendant need not "utter the magic words, 'I want a lawyer,' in order to assert his right to counsel," some sort of affirmative statement or gesture is required. Pet. App. 47a-48a n.68, citing *Montoya*, 955 F.2d at 283.

The primary problem with Louisiana's rule is that the process by which defendants are appointed counsel is not designed to also produce a reliable answer to the question of whether the defendant has affirmatively "accepted" that appointment. Most States do not transcribe initial appearances when counsel is appointed. Thus, disputes over "acceptance" will invariably come down to unreliable after-the-fact swearing contests. Even more to the point, most States do not require that the judge or magistrate engage in any sort of colloquy with the defendant during initial appearances. These are not design flaws; rather, they reflect the natural conclusion that the defendant has accepted the counsel appointed, thus obviating the need to record or further elicit the defendant's choice. Yet, if judges must look back to these hearings to determine not simply whether counsel was appointed but also whether that counsel was somehow affirmatively "accepted," under the current system, they will be facing an evidentiary void. The result will be intractable disputes about whether the defendant affirmatively accepted counsel or not. And the situation is, to put it mildly, a trap for the unwary. Unless a defendant is informed at the initial hearing that he or she must affirmatively "accept" the appointment, the defendant will have no reason to think any affirmative act of "acceptance" is necessary.

A rule requiring an affirmative act of acceptance will also create intractable uncertainty for police officers, who must determine if a particular defendant did or did not affirmatively accept counsel before they can begin questioning. Under Louisiana's rule, an officer would need to discover if the defendant did, in fact, say he appreciated the appointment of counsel or if he stood silent or if he made a gesture and so on. Such an undertaking would be necessary to avoid the suppression of statements made by a defendant who had, in fact, asserted his right to counsel. Under the "acceptance by appointment" rule, however, every officer would know that upon appointment, a defendant is now represented and that all communications would have to be either initiated by the defendant or with the defendant's counsel present. A bright-line rule of this kind, which would require no additional research on the part of the individual detective, would provide salutary guidance to all police officers. *See Dickerson v. United States*, 530 U.S. 428, 444

(2000) (declining to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), in part because the alternative of case-by-case assessments of voluntariness would be "more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner.").

B. The Louisiana Supreme Court's Test Is Logically Unsound.

Beyond its practical problems, the Louisiana State Court rule is logically flawed. There is simply no reason why a criminal defendant who has just been told he has been appointed a lawyer would feel any need to take any affirmative step to "accept" the appointment. After all, the defendant has not been asked whether he wants a lawyer — he has been told that a lawyer is being appointed. Accordingly, the Louisiana rule requires defendants to ask for the very thing they have just been told is theirs.

Forty-five jurisdictions — forty-three States, the District of Columbia and the federal government — provide counsel before, at, or directly after initial appearance. Br. *Amicus Curiae* Nat'l Ass'n of Criminal Defense Lawyers In Support of Petitioner at 1a, *Rothgery v. Gillespie*, No. 07-440 (U.S. filed Jan. 23, 2008) *available at* 2008 WL 218874. Though the manner of appointment varies from State to State, the exchange between the court and the accused is generally the same: The judge or magistrate informs the accused that he has been appointed counsel and, in several jurisdictions — including Parish County, Louisiana — the accused is subsequently given a card that notes his lawyer's name.

In no other context – legal or otherwise – would we expect people to request the very thing that has just been provided to them. It would be as logical to ask that a defendant utter the phrase "I am hungry" after having just received food. Without being told that a statement is necessary or prompted to speak by the court, silent acceptance by the defendant seems not only understandable but prudent. And that is all the more true on this record, given that the authorities questioning Montejo had repeatedly warned him that asking for the help of a lawyer was not in his interest.

C. The Louisiana Supreme Court's Test Is Objectionable As A Matter of Constitutional Principle.

In *Powell v. Alabama*, 287 U.S. 45 (1932), the Court noted that:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad....He requires the guiding hand of counsel at every step in the proceedings against him...If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Id. at 69. This Court properly recognized that the right to counsel is particularly crucial for those defendants who struggle to understand the "science of the law." *Id.* And yet it is these very same defendants who are most likely to be prejudiced by the Louisiana rule. Unable to articulate their need for help, or believing quite reasonably that no such articulation is necessary where a judge has just announced the appointment of counsel, these defendants are likely to stand silent. By construing this silence as a desire to proceed without representation, Louisiana and the Fifth Circuit have created a rule that denies such defendants – the very ones likely most vulnerable during post-indictment police interrogation – the protections of the Sixth Amendment.

The very reason these defendants receive appointed counsel is that this Court has deemed that they could not otherwise have a fair trial. As this Court clearly stated in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), lawyers in criminal proceedings are "necessities, not luxuries." The Louisiana Supreme Court's rule denies those necessities to the people who need them the most.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JELPI P. PICOU
G. BEN COHEN
THE CAPITAL APPEALS
PROJECT
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955

DONALD B. VERRILLI, JR.
Counsel of Record
MARIN K. LEVY*
JENNER & BLOCK LLP
1099 New York Ave. N.W.
Suite 900
Washington, D.C. 20001
(202) 639-6000

* Not admitted in D.C.; supervised by principals of the firm

Counsel for Petitioner

APPENDIX

Appendix A

Supreme Court of Louisiana.
STATE of Louisiana
v.
Jesse Jay MONTEJO.
No. 2006-KA-1807

Jan. 16, 2008.
Rehearing Denied March 7, 2008.

VICTORY, J.

On October 24, 2002, Jesse Jay Montejo and Jerry Moore were indicted by a grand jury for the first degree murder of Lewis Ferrari, a 61-year-old Slidell man who was found dead by his wife in their kitchen on September 5, 2002.[1] After trial, the jury found Montejo guilty as charged on March 9, 2005. The brief penalty phase was held on March 10, 2005.[2] After the presentation of evidence, the jury deliberated for approximately three hours before determining that Montejo should be sentenced to death. On May 13, 2005, defendant's motion for new trial was denied,[3] and Montejo, age 26, was sentenced to death for the first degree murder of Lewis Ferrari, which offense was committed during the commission of an armed robbery and an aggravated burglary. Montejo now appeals to this Court, assigning 20 errors.

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[1] On February 14, 2005, the district court granted the defense's motion to sever the trials of Montejo and Moore. The defense argued in its motion to sever that joint trial was inappropriate because Moore, during his interrogation by police, incriminated Montejo. Moore was tried separately and convicted as a principal to the second degree murder of Lewis Ferrari. His conviction and sentence of life imprisonment without benefit of probation, parole, or suspension of sentence were affirmed by the court of appeal. *State v. Moore*, 06-1979 (La. App. 1 Cir. 3/28/07), 953 So. 2d 209 (unpub'd).

[2] The state presented two witnesses: a correctional officer who was struck by Montejo at the St. Tammany Parish jail, and the victim's adult daughter. The defense presented Montejo's father and mother.

FACTS AND PROCEDURAL HISTORY

Lewis and Patricia Ferrari operated a family dry-cleaning business with nine stores in St. Tammany Parish and one store in Tangipahoa Parish. At 3:30 p.m. on the Thursday of the murder, Mr. Ferrari left the store where his wife worked and went to the grocery store. When he failed to show up for dinner at a local restaurant at 6:00 p.m., Patricia Ferrari went to their home, where she found the garage door open and Mr. Ferrari's car missing. Upon entering the kitchen, she saw groceries on the counter still in grocery bags and found Mr. Ferrari dead on the floor of the kitchen. Mr. Ferrari had suffered two gunshot wounds, one to the right chest area and one to the right eye. The gunshot wound to the eye was fatal within a matter of seconds.

According to the state, the crime was planned by Moore and perpetrated by Montejo with the assistance of Montejo's 19-year-old step-brother, Eric Gai. At trial, witnesses described the victim as a person who followed a well-known and predictable routine, and who was killed on the day he transported the payroll. The victim's widow described her husband's habits for the jury, including how he transported money, deposits, and checks in the trunk of his vehicle on Thursdays, which was the day he did payroll, and how he could usually be found at home between four to six p.m. Birdie Sue Morrow, who worked as a contract seamstress for the victim, confirmed that the victim paid his employees on Thursdays. Typically on Thursdays, the Ferraris would meet at a local restaurant sometime after 6:00 p.m. for a family dinner.

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[3] In this motion, the defense argued concerns that now form the basis of assignments of error 3 (admission of the police report), 10 (denial of the motion to continue), 1 (admission of the confession made after invocation of right to counsel), and 2 (admission of the handwritten statement) in the instant appeal.

The victim's adult son, Lewis Ferrari III, testified that Moore was familiar with his father's routines. Several witnesses described Moore's recent association with the defendant and his long-term but rocky relationship with the victim. The victim's widow testified that Moore had performed mechanical work for the family dry cleaning business for about 10 years but that he became unreliable.[4] Lewis F. Ferrari III confirmed that Moore was capable of good electrical work but that he had become very unreliable, and he said that he objected to his father continuing to employ Moore. Both of these witnesses testified that Moore recently lost his driver's license and he had hired Montejo, whom he met while hitchhiking, to transport him. The victim's son described Montejo's car as a blue van with a distinctive chrome cattle guard in the front.

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[4] She also said that Moore started asking the victim for small loans.

Morrow testified that she saw Moore and the victim argue on two occasions: once about one month before and again on the day of the murder. On both occasions, she heard the victim tell Moore that he was not afraid of him.[5] She said that Moore left after the most recent argument by entering the passenger side of the blue van that routinely transported him. Hugh Dillard, who owns and operates a poboy shop next to the victim's dry cleaning business, also watched Moore and the victim argue loudly outside his shop on the morning of September 5, 2002.[6]

The victim's widow testified that they lived in a quiet neighborhood on Rue Lamothe in Slidell. Several neighbors noticed Montejo's blue van, with its distinctive chrome cattle bar, in the neighborhood the time of the murder.[7] Stacy Stubbenville, who lived on Rue Lamothe, was driving home at about 4:15 p.m. on the day the victim was murdered when she noticed an unusual blue van with a chrome cattle bar on the front. The van had a driver and a passenger. Larry Landry, another neighbor, also noticed the blue van in the neighborhood at some time between three to five p.m. on the day of the murder. Jo Ann Diaro lived near the Ferraris. On the day of the murder, she arrived home at 5:00 p.m. and left again at 5:30 p.m., when she noticed two vehicles: a blue van (driven by a young white male with brown hair) driving very quickly down the street and the victim's white Lincoln (whose driver she could not see) backing out of the Ferraris' driveway. The two vehicles almost collided when the Lincoln cut off the van and they stopped briefly together before exiting the neighborhood. Finally, Janice Dow, who also lived near the Ferraris, saw the blue van driving very quickly through the neighborhood twice on the day of the murder: once at 4:30 p.m. and again at about 5:30 p.m. with the Ferraries' white Lincoln behind it.

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[5] The defense twice objected to Morrow reporting what she heard the victim said to Moore, the objections were sustained, and these statements are among the testimony involved in the defendant's 11th assignment of error.

[6] Dillard had observed them arguing before but never this vehemently. However, he was unable to overhear the contents of the argument.

[7] Neighbor Larry Landry also noticed the van in the neighborhood at around 10 or 11 a.m. on the day before the murder.

The state presented physical evidence, which included the undisputable presence of Montejo's DNA under the victim's fingernails. Dr. Dudhir Sinha, president and laboratory director of ReliaGene, testified as an expert in molecular biology and DNA analysis that he tested scrapings from beneath the victim's fingernails and a reference sample from the defendant. A scraping from the victim's right hand contained only the victim's DNA; a scraping from the victim's left hand contained a mixture of the victim and defendant's DNA. Dr. Sinha also concluded that the victim intentionally scratched defendant because sample characteristics ruled out DNA transfer by coincidental contact.

The victim's body was examined at the crime scene as well as later autopsied by Dr. Mike Difatta, chief deputy coroner for St. Tammany Parish. Dr. Difatta testified as an expert in forensic pathology that the victim sustained two gunshot wounds: one superficial and one fatal. According to Dr. Difatta, the victim was shot once in close contact in his right side and again in his right eye from a distance of at least three feet.[8] The victim would have died within seconds of the gunshot to his head, which the evidence suggested was fired between 4-5 p.m. Dr. Difatta saw no evidence to suggest that the victim was struck in the head with a blunt object. Dr. Difatta identified state's photographic exhibits 2-11, which were admitted without objection, and projected for use by Dr. Difatta's during the latter part of his testimony.[9]

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[8] Dr. Difatta designated the superficial wound as "A" and the fatal wound as "B." The bullet that caused wound "A" entered the victim's right lateral chest and exited his right back without perforating his chest cavity. Searing and soot deposits indicated that this shot was fired from within 12 inches. The bullet that caused wound "B" was fired directly into the victim's right eye, which it destroyed before inflicting lethal damage to his brain and exiting the back of his skull. The lack of searing or stippling indicated that this shot was fired from no closer than 36-43 away. Dr. Difatta testified that nothing necessarily precluded shot "A" from following shot "B", but the victim would have fallen to the floor immediately after shot "B."

[9] These crime scene and autopsy photographs depicted the following: blood spatter on the ceiling in the kitchen and on the dishwasher; bone fragment on the tile floor and kitchen area; the right area and top part of the victim's chest showing where he was shot; the chest area showing the direction through the chest where the victim was shot; the left eye where the victim was shot; the wound on the back part of the victim's head; the

Sergeant Carl Fullilove testified as an expert ballistics and firearms examiner that he examined a bullet and bullet fragments found at the crime scene but noted that the murder weapon was not found in this case. He said that a single intact bullet was extracted from the wall at the crime scene that was similar to the victim's own revolver ammunition,[10] but without the murder weapon it was only possible to infer that the victim was probably killed by a shot from a revolver. James Folse of the St. Tammany Parish Crime Lab collected forensic evidence at the victim's home. He extracted an intact bullet from the dining room wall and recovered bullet fragments from the living room near and underneath the sofa. He obtained only one useful fingerprint from the victim's residence, which was left by a person who was never identified.[11] Susan Downey of the St. Tammany Parish Crime Lab documented the crime scene at the victim's home. She observed an intact bullet in a door casing that appeared to have been shot through the victim[12] and bullet fragments in the concrete slab beneath the sofa. She testified that the

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head area showing the direction through the head that the victim was shot, front to back.

[10] The victim owned Fiocchi .357 caliber Magnum semi-jacketed hollow points. The sample ammunition was provided by the victim's widow.

[11] This fingerprint was recovered from the interior front door. It did not match Montejo, Moore, or Gai, and AFIS returned no matches for it. It was never compared to the victim's family, friends, or neighbors.

[12] This bullet was whole, in good condition, and likely passed through the victim's side. In addition to the victim, this bullet passed through a potato chip bag.

victim's sofa had a bullet hole and the characteristic indentation of a revolver. She described the blood pooling, characterized the blood spatter as "high velocity,"[13] and she saw no signs of struggle but noticed that the bedroom was in disarray. Downey identified 37 photographs of the crime scene, some of which were projected during her testimony, and which were admitted without objection in globo.

Folse also assisted in processing Montejo's van and the victim's Lincoln as well as evidence seized from Gai. He photographed the Lincoln, which was found in an isolated location and later processed at the crime lab by Sergeant Fullilove. The area near this vehicle was searched but no weapon was found. Sergeant Fullilove testified that he found one identifiable partial palm print on the victim's Lincoln, which belonged to the victim, and that the accelerator pedal of this vehicle tested positive for blood. Inside Montejo's van, Folse found receipts for stereo equipment dated September 6, 2002, $322 in cash,[14] and gloves.[15] No blood was found inside the van or on the defendant's clothing. Detectives delivered a seat cushion to the crime lab that was taken from Gai, which Folse documented, that concealed $832. Folse identified photographs of the victim's car, the area in which it was found, and Montejo's van, which were admitted without objection, and some of which were projected during his testimony.

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[13] The defense objected at this point on the basis that the witness had not been qualified as an expert but the district court permitted Downing to provide lay opinion testimony about blood spatter as an employee of the crime lab. This ruling underlies the instant application's 12th assignment of error and is discussed in greater detail in the unpublished appendix.

[14] The receipts were in the pocket of a shirt pocket lying on the driver's seat. The money was inside a wallet on the console. These items as well as stereo equipment and a cell phone from inside the van were admitted without objection.

Montejo was interviewed by police from about 4:30 p.m. until about 11 p.m. on September 6, 2002, and again between approximately 3:00 and 4:00 a.m. on September 7, 2002. The centerpiece of the state's case was approximately four hours of this videotaped police interrogation during which Montejo slowly made increasingly incriminating statements until he finally admitted that he shot the victim who had unexpectedly returned home and interrupted Montejo's burglary.[16] On September 23, 2002, indigent defense counsel moved to suppress these statements contending that they were made involuntarily.[17] At hearings held on April 20 and June 1, 2004, Detective John Morse[18] testified that

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[15] The gloves were admitted without objection. The gloves were not tested for gunshot residue. The crime lab does not test for gunshot residue because it considers the test to be unreliable.

[16] Montejo was interviewed from about 4:30 p.m. until about 11 p.m. on September 6, 2002, and again between approximately 3 and 4 a.m. on September 7, 2002. About four hours of the interrogation were videotaped.

[17] This motion included all "confessions and other inculpatory statements" whether "oral or written" that were "obtained from defendant by all law enforcement officers or other agents of the State...."

[18] Detective Morse was lead case officer in this investigation.

he first encountered Montejo at the Gretna Police station where Montejo, after being verbally *Mirandized*, consented to accompany him to the St. Tammany Sheriff's Office Criminal Enforcement Building to be interviewed.[19] In St. Tammany, Montejo was repeatedly *Mirandized*, signed several rights waivers,[20] and was interrogated by Detective Morse and Detective Willis Wade Major.[21] Both detectives testified at the suppression hearings[22] that Montejo understood his rights, was not intoxicated, showed no sign of mental defect, was not promised or threatened anything, spoke to them voluntarily, and freely waived his rights.

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[19] Detective Major also encountered Montejo at the Gretna Police station but was not involved in transporting him back to St. Tammany. Montejo testified at trial that he asked detectives in Gretna if he could have a lawyer present but they told him they would not recommend that.

[20] The exhibits include seven written rights form and waivers signed by the defendant (in chronological order): September 6 at 4:38 p.m. and at 10:02 p.m.; September 7 at 3:45 a.m.; September 9 (but see below) at 8:45 a.m., noon, and 2:45 p.m., and September 10 at 3:40 p.m. The interrogation began on September 6 after the defendant waived his rights at 4:38 p.m. The videotape stopped after he invoked his right to counsel, but began again when he waived his rights at 10:02 p.m. and the interrogation resumed. His final videotaped confession was obtained after he waived his rights at 3:45 a.m. on September 7. The excursion with police occurred after he waived his rights on September 10. It appears that the September 9 waivers were dated incorrectly by mistake and in fact occurred on September 10. According to Detective Hall, the signing of the 8:45 a.m. and noon waivers were followed by brief discussions in which detectives sought information on the location of the murder weapon and the victim's money.

[21] Captain David Hall also appears intermittently during the videotaped interrogation but was not called to testify at the suppression hearings. Detective Jerry Hall was involved in the final confession that was videotaped between 3 and 4 a.m. on September 7.

[22] Their testimony at the suppression hearings was consistent with their later testimony at trial.

The videos of the interrogation on September 6, 2002, up until Montejo invoked his right to counsel at about 10 p.m., show the following. The video begins a little before 7 p.m.[23] The defendant was shirtless[24] and smoking[25] as he related his first version of the crime, in which he claimed that his only involvement was in driving Moore to the victim's home and leaving him there without knowing that Moore was going to rob and kill the victim. Confronted with the potential that his DNA might be found inside the home,[26] Montejo related his second version of the crime. He said that the victim was not home when he arrived at about 5 p.m. with Moore, who told him that they could wait inside. After about 10 minutes, Moore started

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[23] About three minutes after the video starts (at 0:02:54), Montejo checks his watch and comments that it is 7 p.m.

[24] He is provided with a shirt after his clothing is seized pursuant to a warrant. On the remainder of the video, he wears the shirt detectives gave him. However, he comments, during the collection of physical evidence, that he normally does not wear a shirt. Detective Major testified at trial that there was a space heater running in the room and Montejo did not complain that he was cold or request clothing.

[25] He smoked one cigarette at the beginning of this tape. The detectives gave him another about 40 minutes later. At about 1:15:15, he requested and received another cigarette. They later give him another cigarette, which he did not request.

[26] Montejo initially denied entering the victim's home. When confronted with the possibility that his DNA might be found inside the home, he admitted that he was there previously but denied entering the home of the day of the murder. After the detectives falsely claim that forensic analysis can determine when he was in the home (at about 0:02:25), Montejo admitted that he entered the home and proceeded to relate his second

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version of the crime. Both detectives conceded at trial that they misled Montejo about forensic science. According to one commentator, at least one popular interrogation training manual recommends this tactic:

> The authors recommend a panoply of interrogation techniques, including the use of a false evidence ploy to produce a confession. Making reference to the "average person['s] ... mystical notions of the power of scientific crime detection," the O'Hara & O'Hara Manual suggests that such persons "will accept practically any claims that science may make."

Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 Fordham Urb. L.J. 791, 813 (2006). That commentator also reports that the presentation of false evidence has been empirically shown to be "a highly effective method of eliciting self-incriminating information." *Id.* at 819. Finally, that commentator notes that such tactics are generally acceptable to the courts:

> Few federal courts have circumscribed the use of specific deceptive interrogation techniques, and only in rare cases have federal courts deemed deceptive interrogation practices coercive.... Interrogations employing false or fabricated evidence where interrogators have misled suspects to believe that police possessed inculpatory evidence, including physical evidence or accomplices' confessions, have generally been held to be voluntary.

Id. at pp. 805-06.

ransacking the residence, so Montejo left.[27] He became disoriented and was briefly lost in the neighborhood. After he regained his bearings, he saw Moore drive away in the victim's car. Montejo attempted to answer the detectives' follow-up questions, but abandoned this story for a third version, after detectives suggested that Moore would blame Montejo and confronted him with the possibility that the forensic evidence would prove that the victim scratched his neck or that he was present when the murder weapon was fired.[28] In the third version, Montejo did not leave when Moore (who was wearing gloves) ransacked the home. Instead, he and Moore hid when the victim arrived. Moore struck the victim over the back of the head with the gun and Montejo tried to run. The victim turned and flailed wildly, scratching Montejo, and Moore shot the victim, who remained standing. As Montejo fled, he heard a second shot. Montejo became briefly lost in the neighborhood and saw Moore drive away in the victim's car. In response to

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[27] In the context of explaining why he wouldn't stay while Moore ransacked the home, Montejo refers to his prior incarceration. This is one of the eight remarks underlying the defendant's seventh assignment of error.

[28] In this latter portion, the detectives again mislead Montejo as to the capabilities of forensic science. The detectives also left Montejo to sit alone for about nine minutes during this portion of the interrogation. In the context of discussing cooperating with the police, Montejo refers to his prior incarceration three times, one of the detectives refers to Montejo's prior incarceration once, and Montejo also implies that he has been interviewed by detectives in the past. These are five of the eight remarks underlying the defendant's seventh assignment of error.

Demands for corroborating physical evidence, such as the location of the murder weapon or any stolen property,[29] and again confronted with forensic evidence,[30] Montejo invoked his right to counsel but quickly retracted his request as follows:

> Montejo: "I would like to answer no more questions unless I am in front of a lawyer."
>
> Captain Hall:[31] "Good enough." (exits)
>
> Montejo: "Now, ..."
>
> Detective Morse:[32] "You are under arrest for first degree murder."[33]
>
> Montejo: "... now, I know you aren't that bad a

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[29] While discussing the murder weapon, the detectives again exaggerate the capabilities of forensic science.

[30] After physical evidence is collected pursuant to a warrant (including fingernails, hair, blood, clothing, and photographs), the detectives tell Montejo that they know he, and not Moore, was the shooter because of the forensic evidence. Detective Major testified at trial that they did not have the DNA evidence at this time but claimed they did to encourage him to confess.

[31] This is Captain David Hall and not Captain Jerry Hall. Captain Jerry Hall testified at the hearings on the motion to suppress; Captain David Hall did not. To distinguish the two, Captain Jerry Hall is often referred to as Detective Hall in this opinion.

[32] The identities of the detectives in the video can reasonably be inferred from their testimony at the suppression hearing regarding who informed Montejo that he was under arrest and the order in which they left the room.

[33] Montejo testified at trial that he became frightened when he heard that he was under arrest for first degree murder.

people and all ..."

(both detectives stand and turn toward exit)

Detective Major: (interrupting) "Dude, you don't want to talk to us no more, you want a lawyer, right? I trusted you and you let me down."

Montejo: "No, come here, come here."

Detective Major: "No, no, I can't."

Montejo: "No, come here ..."

Detective Major: "No, you've asked for an attorney, and you are getting your charge. And the shame of it is ..."

Montejo: "I don't want no attorney."

The video recorder was turned off at this point and did not begin again until approximately 10 minutes later. All detectives testified at the suppression hearings that, after the exchange quoted above, they terminated the interview and left the room. At trial, Detective Major testified that after the tape was turned off, Montejo "started to literally beg us to come back into the room to continue the interview." The detectives then met with their supervisors for ten minutes to determine whether they could legally continue the interview. Detective Major testified that during this time, Montejo "continued to ask us to come back in, come back in." Detective Morse testified that he briefly spoke to

Montejo during the unrecorded period to verify that he wished to continue the interview in the absence of legal counsel.[34] The district court reviewed the tapes, found the detectives' testimony credible, and found that Montejo immediately revoked his request for legal counsel.

After Montejo invoked and revoked his right to counsel, defendant was again read his *Miranda* rights and signed written waivers of those rights. In the video, the detectives confirmed with Montejo, who was visibly upset,[35] that he was not interviewed during the preceding untaped interval and that he understood his rights and wished to continue the interview in the absence of counsel. Montejo then retracted his claims that Moore killed the victim, and told a fourth version of the crime as a botched burglary.[36] He said that Moore persuaded him to burglarize the victim's home, which he believed would be unoccupied, unlocked, and full of money, and that he agreed to do so because his rent was due. However, he found the victim's gun inside the home and, when the victim came home and surprised him, Montejo hit him in the head with the gun, warned him to stay back, fired a warning shot, and when that failed, shot and killed the victim, before firing the weapon into the couch to un-cock it, and throwing the gun in the lake. After detectives confronted him with the fact that two vehicles left the crime scene together, Montejo retracted this story and told a fifth version of the crime, in which he blamed a person he knew only as "D.P.," an African-American male from the Fischer projects, whom he claimed would be impossible to locate. Montejo said he was introduced to D.P. by Moore, who wanted defendant and D.P. to rob the victim. Montejo agreed because his rent was overdue so he met D.P. at the Rally's and they went to the victim's home. After detectives confronted Montejo with the implausibility of this story, they terminated the interview and the video stops. The defendant was arrested and transported to jail.

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[34] Montejo testified at trial that Detective Morse returned to the room and offered him one more chance to save his life, save Gai, and express remorse on video so that a jury wouldn't sentence him to die.

[35] Montejo initially appeared tearful and, at about 0:02:06, lowered his head and said "What am I doing?"

[36] During this rendition of the crime, Montejo refers to his prior six-year-long incarceration as a juvenile. This is another of the eight statements underlying the defendant's seventh assignment of error.

Detective Major and Captain Jerry Hall interviewed Montejo about four hours later in the early morning on September 7, 2002, and that interview was also videotaped. During this interview, Montejo told his sixth version of the crime.[37] He said that Gai, who did not know that Montejo planned to burglarize the home because his rent was overdue, dropped him off at the victim's house at about 5:30 p.m. and was instructed to return later. Moore had told Montejo that the house was unlocked, contained a lot of money, and would be unoccupied because the family would be at dinner.[38] Inside the home, Montejo found a gun, which he picked up to use to scare anyone away who might come home. When the victim returned 10 minutes later, Montejo hit him over the head with the gun, which failed to knock him out, and then fired a warning shot that he intended to miss the victim. However, the victim continued to struggle with him so Montejo shot him. Montejo fled in the victim's vehicle, and found Gai and told him to follow him. Montejo threw the gun out of the window into the lake from the Highway 11 bridge, burned the victim's money bag, threw his gloves out of the window on the highway, gave $800 to Gai, gave some money to Moore, and used his share of the money to pay bills.

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[37] During this statement, Montejo comments once that he stole cars as a juvenile and that he had just been released from prison. The is the last of the eight remarks underlying the defendant's seventh assignment of error.

These videos were played for the jury at trial. The defendant also testified. He testified that he falsely confessed during the videotaped interrogation because he was exhausted and trying to satisfy the detectives. He then told a seventh version of the crime, which was an elaborated variation of the fifth in which D.P. was first introduced.[39] Defendant testified that on Friday of the week before the murder, when he went to pick up money from the victim on behalf of Moore, the victim introduced him to D.P. and suggested they all meet next week to discuss Montejo working as D.P.'s, rather than Moore's, driver. Montejo described D.P. as an African-American male, about 5' 8" tall, with his initials tattooed in an Old English script on his forearms, who lived in the Fischer Projects. Next week, on the day before the murder, the victim told Montejo to come to his house the next day before 6 p.m. The next day, Eric Gai, his stepbrother, dropped him off at the victim's house, and D.P. answered the door. Inside the residence, D.P. displayed a gun, grabbed Montejo, and took his wallet, from which D.P. retrieved Montejo's license, which he scrutinized. D.P. commented that he now knew where Montejo lived, asked him if he had a big mouth, forced him to the floor, placed the gun against his head, threatened to kill or have killed Montejo or a member of Montejo's family, and fired the gun into the couch to intimidate him. The victim then arrived and D.P. instructed Montejo to hide. When the victim entered the kitchen, D.P. hit him, which caused the victim to fall onto Montejo.[40] The victim turned around and swung at D.P., who fired at him, and the victim then threw his arms up and backed up. D.P. then threatened them both and demanded the victim's "big stash."[41] D.P. took

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[38] Moore said he couldn't burglarize the house himself because he would be recognized in the neighborhood.

[39] Aside from additional details, the primary differences between this and the earlier version were that Montejo now claimed that the victim, rather than Moore, first introduced him to D.P., and he no longer conspired from the beginning to commit burglary with D.P. but rather was surprised by D.P.'s unilateral criminal acts. A family friend, Mary Melancon, also testified at trial that Montejo told her the same story when she visited him in jail.

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[40] Montejo speculated that this is how his neck was scratched by the victim.

[41] According to Montejo, the victim said he had $2500 in a money bag but D.P. was dissatisfied with that amount and demanded more.

Montejo's wallet again, placed some of the victim's money in it before returning the wallet to Montejo, instructed the victim to give Montejo his car keys,[42] threatened Montejo's family again, told him to leave, and held the gun to the victim's face. As Montejo left, he heard D.P. threaten the victim and the victim assure D.P. that he would cooperate. Montejo closed the door, heard a gunshot, and fled in the victim's car but became temporarily lost. Montejo then found Gai but almost collided with him trying to get his attention. He instructed Gai to follow him and they abandoned the victim's car on a dirt road. Montejo then told Gai what had happened and gave him the money that D.P. put in his wallet. He did not contact the police because he believed D.P.'s threats.[43]

In addition to these seven versions of the crime, the record contains one additional statement by the defendant: a handwritten letter of apology to the victim's widow, which forms the basis of the defendant's second assignment of error. The letter was written by Montejo (with pen and paper provided by detectives) on September 10, 2002, as he sat in the back of a police vehicle during an excursion in which he accompanied detectives to show them where he disposed of the murder weapon[44] and other evidence.[45] According to Detective Hall, he was unaware that the indigent defender board had been appointed to represent the defendant on the morning of September 10,[46] and Montejo was again *Mirandized* before he agreed to accompany and assist detectives that afternoon.[47] This letter was ruled

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[42] Montejo said he tried to decline the victim's car keys but the victim encouraged him to take them and leave.

[43] However, the next day, Montejo did tell Moore what had happened. By the time of trial, Montejo said that his family had since moved and was now safe from D.P.

[44] Montejo created some confusion as to where he disposed of the murder weapon and, in fact, this weapon was never recovered (although divers conducted a grid search of over

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100,000 square feet). At some point, Gai told police that he thought Montejo threw the gun over the levee where they left the victim's car but Montejo denied this claim. In his final videotaped statement, Montejo recalled that he threw the murder weapon off the Highway 11 bridge as he was returning from the westbank and realized that he previously told detectives to search on the wrong side of the highway bridge. After making his final videotaped statement, Montejo went with Detective Major in the early morning on September 7 to show him where on Highway 11 he threw the weapon off the bridge. That, however, is not the excursion during which Montejo wrote a letter of apology to the victim's widow (at issue in the defendant's second assignment of error) which occurred on September 10.

[45] Montejo claimed at one point that he burned the victim's money bag. During the excursion on September 10, he pointed out a dumpster at a gas station where he said he threw the money bag. However, detectives found that the trash had already been collected from this dumpster.

[46] In fact, Detective Hall testified that, at some point during this excursion, he asked Montejo whether he had a lawyer or anyone in his family had contacted him about retaining one for him, and Montejo responded negatively. Detective Hall was confronted by indigent defense counsel when he returned Montejo to jail.

[47] Montejo testified at trial that Detective Hall asked him if a lawyer had been appointed for him, and when he responded affirmatively, told him that he was mistaken. During this excursion, Montejo also produced a brief handwritten statement to explain that he was accompanying detectives voluntarily and gave the following reason for assisting the detectives: "At first I wasn't truthful out of being scared but now I see cooperation

admissible after the suppression hearings and was admitted at trial during the testimony of Detective Hall. Prefaced with an expression of remorse and bracketed by calls for forgiveness, Montejo explained in this letter that he only intended to commit a burglary[48] but that when he was unable to frighten the victim with the gun and to escape he fired two shots (the first intended only as a warning shot) before grabbing the victim's car keys and firing the gun into the couch.[49]

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makes me feel 100% better." This statement was admitted into evidence during the testimony of Detective Hall. As noted previously, there was some confusion as to whether this excursion occurred on September 9 or 10, but it was eventually resolved and the correct date determined to be September 10.

[48] Montejo uses the phrase "simple burglary" in his handwritten letter. The defense construes this as a legal term of art and, based on that construction, argued at trial that the letter must have been dictated by a person who was familiar with the statutory forms of burglary, such as a law enforcement professional.

[49] This two-page letter reads as follows (with spelling and punctuation unaltered but capitalization normalized for legibility):

> Ms. Ferrari,
>
> This is very hard to put in the right words but I will try hard. My soul is feeling you very much. If I could rwind time I wish that bullet would of hit me. Please finish reading. I really want you to know I had no intention on his death and I am in a log of true pain I'm so sorry I can picture your heart dropping at sight it is eating me up inside so bad. I try to talk to Loue every day to say I'm sorry and wish I could let you feel my emotion to know truely how sorry and how bad this is tearing me up. I promise you I didn't cold blood

kill Mr. Loue if I could change places I would be dead. Please be strong only God really knows why this happen you a beautiful woman and I'm huting more than you would really expect to know I caused that I did crimes before but I'm really not as harmful as what happen please forgive me Ms. Ferrari I prey for you to be strong and get through I will prey every day I'm accepting God for once in my life and begging for forgiveness I'm so sorry please forgive me I was going for a simple burgulary in and out that someone put me on and instead I found the gun so I thought if some reason some one does come in I can scare with the gun and run but he wasn't scared I swear I tried to just run Ms. Fearri but he wouldn't let me I even fired a warning which skint him on the side but he still kept coming strong I couldn't see then the shot and he flew back I ran with no ride I grabed his keys I almost shot myself the gun was cocked back agin and I didn't know how thats how scared I was so I shot into the couch I know you needed to know this Ms. Ferri and may God make you strong please I need your forgiveness Ms. Ferri I'm more than sorry for what happen please forgive me please I'm sorry I lost my life too, my baby my beautiful girl I'm so sorry.

[signature]

Please forgive me Miss. Ferri may God be with you and make you strong because hes killing me inside.

9-10-02

8:30 p.m.

The defendant testified at trial that he was prompted to write this letter by detectives and that much of its contents were suggested by Detective Galloway, who accompanied Detective Hall and Montejo on September 10, but did not testify at trial.

As stated above, after trial, the jury found defendant guilty as charged and sentenced him to death. On appeal, we now consider his 20 assignments of error, most of which are treated in an unpublished appendix to this opinion.

DISCUSSION

Right to counsel: invocation and waiver

Assignment 1. Defendant contends that the district court erred in admitting the two videotaped statements that he made after he requested an attorney. Defendant alleges that detectives responded to his request by becoming upset and berating him for his decision, which the defendant characterizes as a calculated effort by police to provoke a change of heart so that they could continue the interrogation. Defendant concedes that, at the close of the video, he can be heard to say that he does not want an attorney. However, he contends that the state failed to carry its burden of proving that he freely and voluntarily changed his mind under the circumstances, which include the emotional reactions of the detectives that were captured in the video, the existence of 10 unrecorded minutes before the resumption of questioning, and his visibly distraught condition when the recorded interrogation resumed. Defendant characterizes the entire interrogation as coercive, and alleges that he was exhausted and intimidated by the process.[50] Finally, defendant claims that he was compelled to testify at trial to counter these improperly admitted video statements.

The state responds by emphasizing that defendant's immediate change of heart appears on video, and by noting that the district court made factual · determinations that: the defendant reinitiated the interview; his request was initially refused by the detectives; and that he persisted in waiving his right to counsel. The state also refers this Court to the video of the defendant's re-*Mirandization* and his signed waiver form. Alternatively, the state contends that the error in admitting these statements, if any, is harmless in light of the evidence against the defendant, which includes his admission (before requesting an attorney) that he was present at the time of the murder as well as the presence of his DNA under the victim's fingernails.

In *Miranda v. Arizona,* 384 U.S. 436, 444-45,

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[50] Among other things, the defense claimed that the detectives coerced Montejo by suggesting that, if he continued to speak with them, he might be convicted only of manslaughter (rather than murder), and that he could protect his younger stepbrother, Eric Gai. Although Detective Morse conceded that another detective might have explained the statutory definitions of manslaughter and murder to Montejo at some point during the interrogation, he did not do so. Detective Major admitted that he discussed manslaughter and murder with Montejo as an interrogation technique but denied that he said that if Montejo cooperated he would only be charged with manslaughter. Detective Morse denied discussing Gai when Montejo invoked his right to counsel.

86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694 (1966), the Supreme Court found that if a suspect indicates "in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Edwards v. Arizona,* 451 U.S. 477, 481-85, 101 S. Ct. 1880, 1883-85, 68 L. Ed. 2d 378 (1981), reconfirmed these views and, to lend them substance, held that when an accused either before or during interrogation asks for counsel, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated, custodial interrogation, even if he has been advised of his rights. The accused is not subject to further interrogation by the authorities until counsel is present, unless the accused himself initiates further communication, exchanges, or conversations with the police. *Edwards,* 451 U.S. at 484-85, 101 S. Ct. 1880. In *Minnick v. Mississippi,* 498 U.S. 146, 150-53, 111 S. Ct. 486, 490-91, 112 L. Ed. 2d 489 (1990), the Court confirmed that the *Edwards* rule bars police-initiated interrogation unless the accused has counsel with him at the time of questioning. "Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease; and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Minnick,* 498 U.S. at 153, 111 S. Ct. 486.

The requirement that "interrogation must cease" as soon as counsel is requested means what it says, the immediate termination of the interview, even if the request for an attorney occurs in the midst of standard *Miranda* warnings. *See Smith v. Illinois,* 469 U.S. 91, 93, 105 S. Ct. 490, 491, 83 L. Ed. 2d 488 (1984) (per curiam) (ordering a confession taken in violation of *Edwards* suppressed where police "[i]nstead of terminating the questioning at th[e point defendant invoked his right to counsel] ... proceeded to finish reading Smith his *Miranda* rights and then pressed him again to answer their questions."); *see also State v. Koon,* 96-1208 (La. 5/20/97), 704 So. 2d 756, 763, *cert. denied,* 522 U.S. 1001, 118 S. Ct. 570, 139 L. Ed. 2d 410 (1997). When a defendant exercises his privilege against self-incrimination the validity of any subsequent waiver depends upon whether police have "scrupulously honored" his right to remain silent. *Michigan v. Mosley,* 423 U.S. 96, 102, 96 S. Ct. 321, 326, 46 L. Ed. 2d 313 (1975). *Miranda* and *Edwards* are prophylactic rules designed to protect an accused against the inherently compelling pressures of custodial interrogation, whether by police badgering, overreaching or subtle but repeated efforts to wear down an accused's resistance and make him change his mind. *Oregon v. Bradshaw,* 462 U.S. 1039, 1044, 103 S. Ct. 2830, 2834, 77 L. Ed. 2d 405 (1983); *Wyrick v. Fields,* 459 U.S. 42, 45-46, 103 S. Ct. 394, 395, 74 L. Ed. 2d 214 (1982); *Rhode Island v. Innis,* 446 U.S. 291, 298-99, 100 S. Ct. 1682, 1688-89, 64 L. Ed. 2d 297 (1980).

Louisiana adheres to these principles. When an accused invokes his *Miranda* right to counsel, the admissibility of a subsequent confession or incriminating statement is determined by a two-step inquiry: did the accused initiate further conversation or communication; and was the purported waiver of counsel knowing and intelligent under the totality of the circumstances. *See State v. Abadie,* 612 So. 2d 1, 5-6 (La.1993), *cert. denied,* 510 U.S. 816, 114 S. Ct. 66, 126 L. Ed. 2d 35 (1993); *see also* La. R.S. 15:452 (no arrestee "shall be subjected to any treatment designed by effect on body or mind to compel a confession of crime."). Whether police have "scrupulously honored" an accused's right to silence is determined on a case-by-case basis under the totality of the circumstances. *See State v. Brooks,* 505 So. 2d 714, 722 (La. 1987), *cert. denied,* 484 U.S. 947, 108 S. Ct. 337, 98 L. Ed. 2d 363 (1987); *State v. Harper,* 430 So. 2d 627, 633 (La. 1983); *State v. Manning,* 380 So. 2d 46, 50-51 (La. 1980). Factors entering into the assessment include who initiates further questioning; whether there has been a substantial time delay between the original request and subsequent interrogation; whether *Miranda* warnings are given before subsequent questioning; whether signed *Miranda* waivers are obtained; and, whether the later interrogation is directed at a crime that had not been the subject of the earlier questioning. *Michigan v. Mosley,* 423 U.S. at 105, 96 S. Ct. 321; *State v. Brooks, supra; State v. Harper, supra.*

In *Oregon v. Bradshaw, supra,* a plurality of the Supreme Court clarified *Edwards* by offering a two-step inquiry to be used to determine whether a defendant validly revoked his previous request for counsel, the first step of which is to determine whether the defendant reinitiated communication with police prior to the interrogation resuming. 462

U.S. at 1045-46, 103 S. Ct. 2830. To answer that question, courts must also consider the intertwined questions of whether the interrogation ceased with the defendant's request for counsel and whether his request was scrupulously honored.[51] *See Edwards,*

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[51] The Supreme Court has commented that "[f]irst the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine,* 475 U.S. 412, 421, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410 (1986). If it is found that the interrogation continued beyond the request for counsel, a defendant's act in reinitiating communication might be attributable to the circumstances of the interrogation rather than the defendant's volition. Likewise, if it is found that a request for counsel was not scrupulously honored, then a defendant has no reason to believe his revocation will be given greater effect than his original demand received. As noted by the Supreme Court in *Smith,* "No authority, and no logic, permits the interrogator to proceed ... on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all." *Smith v. Illinois,* 469 U.S. 91, 99, 105 S. Ct. 490, 494, 83 L. Ed. 2d 488 (1984) (quoting the dissenting judge in the decision of the state court below). Nor should the state be shielded by a defendant's revocation of a request it did not scrupulously honor. As emphasized by the dissent in *Olmstead v. United States*:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously.

451 U.S. at 484-85, 101 S. Ct. 1880; *Mosley,* 423 U.S. at 102, 96 S. Ct. 321. Although notions of what constitutes an interrogation, when the interrogation stops, and when it begins again, are all susceptible of becoming legal terms of art, the Supreme Court has thus far kept the analysis grounded in plain language and ordinary notions. For example, in *Rhode Island v. Innis,* the Supreme Court construed interrogation broadly but plainly:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the subject, rather than the intent of the police.

Innis, 446 U.S. at 300-01, 100 S. Ct. 1682. Likewise, the Court in *Smith v. Illinois* applied the requirement that "interrogation must cease" as soon as a suspect asks for an attorney in a manner that suggested it means what it says, *i.e.,* the immediate cessation of the interview, even if the request comes in the middle of *Miranda* warnings. *Smith,* 469 U.S.

Olmstead, 277 U.S. 438, 485, 48 S. Ct. 564, 575, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting).

at 93, 105 S. Ct. 490. Finally, in *Oregon v. Bradshaw,* the plurality[52] defined what might constitute reinitiating interrogation mostly in terms of what would not be considered a bid to reinitiate the interview:

> While we doubt that it would be desirable to build a superstructure of legal refinements around the word "initiate" in this context, there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to "initiate" any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which the word was used in *Edwards.*

Bradshaw, 462 U.S. at 1045, 103 S. Ct. 2830. This Court scrupulously honored these precedents in *State v. Koon, supra* at 762-63 (finding that, although the error ultimately proved harmless,

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[52] The dissent (joined by three justices) defined "initiate" more narrowly to include only statements "about the subject matter of the criminal investigation." *Bradshaw,* 462 U.S. at 1053, 103 S. Ct. at 2839 (Marshall, J., dissenting, joined by Brennan, Blackmun, and Stevens, JJ.).

"[b]ecause defendant did not reinitiate the conversation but instead the interrogation never ended, the oral statements to [the police officers] should have been suppressed."). With the analysis framed according to common conceptions and expectations, the events captured on video in the instant can now be evaluated.

Defendant's unequivocal and unambiguous request for counsel was captured on video. Defendant informed detectives, after being interviewed for several hours, that he did not wish to answer any more questions without a lawyer. His statement was accompanied by equally clear physical signs that he considered the interview to be over (such as putting his watch back on and leaning back from the interviewers), and the detectives reflected their comprehension of his request both verbally and by standing and preparing to exit the room. The state does not argue that this invocation was unclear or misunderstood. However, at the heart of the dispute is the almost immediate reversal that followed the defendant's request for counsel, which is contained in a crucial interchange lasting about 40-45 seconds. As he soon as he was informed that he was under arrest, and as detectives were leaving the room, the defendant called the detectives back and stated that he did not want a lawyer. There is no question that the interview was terminated and the defendant's right to refrain from answering additional questions was scrupulously honored, at least with respect to Captain Hall, who simply stated "Good enough" before leaving the room. However, the defendant, only one second later and in the absence of any obvious cue from detectives, began to speak again. He was interrupted, and in fact never completed his thought, but the gist of what he appears to have tried to convey was a social bid to reconcile with detectives: "Now, [...][53] now, I know you aren't that bad a people and all...." Although it could be argued that this statement evinced a willingness and a desire for a generalized discussion about the investigation, as the *Bradshaw* Court found the question "Well, what is going to happen to me now?" to express such a willingness,[54] Montejo's statement appears to be more fairly described as reflection about the way the interrogation was conducted, which at least one court has found constitutes a statement relating to routine incidents of the custodial relationship.[55] Before the defendant

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[53] This ellipsis is placed here to indicate when Detective Morse informed the defendant that he was under arrest.

[54] See *Bradshaw*, 462 U.S. at 1045-46, 103 S. Ct. 2830 ("[a]lthough ambiguous, the respondent's question in this case to what is going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship").

[55] See *U.S. v. Glover*, 1999 WL 79620 *9 (D. Kan.) (unpub'd), in which the defendant commented "You and Chuck are nice. Those other guys are assholes. All they did was yell." The Glover court rejected the state's contention that those statements constituted an "initiation":

> We find Mr. Glover's remarks, when viewed in the context of the entire conversation in Detective Heinrich's car, were nothing more than his reflections about the way the interrogation was conducted, i.e., the procedures surrounding the interview. As such, his utterances were more akin to "statements relating

could complete this statement, in fact after he only managed to get out the first word, Detective Morse also terminated the interview and scrupulously honored the defendant's request, pausing only to inform the defendant that he is under arrest for first degree murder before exiting the room.

Detective Major also interrupted the defendant. However, this detective's response merits close scrutiny because he commented on the defendant's decision to terminate the interview: "Dude, you don't want to talk to us no more, you want a lawyer, right? I trusted you and you let me down." Because this remark was directed at the defendant, it can be considered as more likely to elicit a response than, for example, statements among detectives.[56] However, mitigating against a

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> to routine incidents of the custodial relationship." Viewed in their proper context, Mr. Glover's statements simply cannot reasonably be construed as evincing a willingness and a desire for generalized discussion about the substances of the investigation.

Id. Nor does the defendant's statement in the instant case appear to be comparable to "soliciting advice about his predicament", which one court characterized as "inviting discussion of about the crime of which he was charged." See *Vann v. Small,* 187 F.3d 650 (9th Cir. 1999 (Cal.)) (unpub'd). The instant defendant's statement certainly less clearly evinces a willingness and a desire for a generalized discussion about the investigation than repeating that "he had to tell somebody." See *Shedelbower v. Estelle,* 885 F.2d 570, 573 (9th Cir. 1989)

[56] *See Innis,* 446 U.S. at 302-03, 100 S. Ct. 1682; *see also Shedelbower, supra* at 573 ("Since the officer's comments to *Shedelbower* were not in the form of express questions, they do not constitute interrogation in the normal sense of the word.

finding that this detective's statement amounted to the functional equivalent of interrogation is the fact that the statement did not invite a response from the defendant.[57] It is only after Detective Major made this statement that the defendant began pleading with detectives: "No, come here, come here." Likewise, it is only after Detective Major began his next statement (which was unfinished in the video), that the defendant clearly stated that he did not want an attorney (which is the last statement that can be heard before the video abruptly stops). This final unfinished statement by Detective Major was a refusal combined with what remains unknown: "No, you've asked for an attorney, and you are getting your charge. And the shame of it is...." However hectoring Detective Major's tone, his comments are not questions and were not reasonably likely to elicit an incriminating response. Further, they are not the functional equivalent of express questioning, which "any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect."[58] Also significant is the fact that Detective Major's critical comments were not necessarily themselves unprompted, but were made in response to the

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Rather, we must determine whether it was interrogation in the sense described in *Innis*, where the statements were expected to elicit an incriminating response."); *Vann v. Small, supra* ("Other facts suggest that the remark was not 'interrogation.' It did not involve an express question ...").

[57] *See Innis*, 446 U.S. at 302, 100 S. Ct. 1682; see also *Vann v. Small*, supra (commenting that the detective's comments were not "particularly evocative" but instead were "rather vacuous").

[58] *Rhode Island v. Innis, supra.*

defendant's earlier attempt at reconciliation.[59] Finally, the detectives did refuse to continue to speak with Montejo until after they investigated the legality of proceeding.[60]

The totality of the circumstances indicates to us that the interview was properly terminated and the defendant's rights scrupulously honored before his retraction of his request for counsel. We must now move on to the second step of the inquiry and determine whether the defendant validly waived his rights before the resumption of the interrogation.[61] Although the burden on the state of proving waiver is a heavy one,[62] the instant case presents no basis to doubt the district court's conclusion that the defendant knowingly and intelligently waived his rights.

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[59] *Cf. U.S. v. Montgomery*, 714 F.2d 201, 203-04 (1st Cir. 1983) (suggesting that the defendant was goaded into further questioning, which lead to his making incriminating statements, by the detective's deliberately unresponsive answer to the defendant's question).

[60] One court expressly found this factor significant:

> We must consider, however, whether the fact that the police spoke first after Shedelbower had stated that he wanted to call an attorney vitiates Shedelbower's express request for a further discussion. The remarks of the police were not an invitation to further discuss the matter. In fact, the police refused to do so until they spoke to the district attorney and returned and gave a further *Miranda* warning to assure that Shedelbower really wanted to discuss the matter without the presence of an attorney.

Shedelbower v. Estelle, 885 F.2d 570, 573 (9th Cir. 1989). Shedelbower involved a similar scenario to the instant case in which, when an initially cooperative defendant invoked his right to counsel, detectives stood, informed the defendant that he was under arrest, after which the defendant revoked his request for counsel. *See Shedelbower*, 885 F.2d at 572. The immediate withdrawal by a suspect during an interrogation of his request for counsel appears to be not wholly uncommon. *See, e.g., People v. Childers*, 94 Ill. App. 3d 104, 49 Ill. Dec. 939, 418 N.E.2d 959, 964 (1981).

A waiver is valid if it is a knowing and intelligent relinquishment of a known right under the totality of the circumstances, which in turn is determined by "the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 2d 1461 (1937); *Edwards v. Arizona, supra; Oregon v. Bradshaw, supra.* The courts will indulge every reasonable presumption against a waiver. *Brewer v. Williams,* 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977). The Supreme Court in *Colorado v. Spring* delineated a two-part test to be used to determine whether a suspect validly waived his *Miranda* rights:

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[61] *Edwards v. Arizona*, supra, 451 U.S. at 484-485, 101 S. Ct. 1880; *Miranda v. Arizona*, supra, 384 U.S. at 440-445, 86 S. Ct. 1602.

[62] *Miranda*, supra, 384 U.S. at 475, 86 S. Ct. 1602 ("If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.").

> First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

479 U.S. 564, 573, 107 S. Ct. 851, 857, 93 L. Ed. 2d 954 (1987) (citations omitted). In the instant case, defendant's re-*Mirandization* and his signing of a written waiver was captured on video. Regarding written waiver, the Supreme Court has noted:

> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but it is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case.

North Carolina v. Butler, 441 U.S. 369, 373, 99 S. Ct. 1755, 1757, 60 L. Ed. 2d 286 (1979). As noted above, the instant defendant was re-advised of his *Miranda* rights and he signed a written waiver form, all of which was captured on video, before the interrogation resumed and the defendant made his most incriminating statements.

Nonetheless, defendant argues that his relative youth, the length of the interrogation,[63] his visibly distraught condition at the time he executed the waiver would support a determination that the waiver was invalid. Defendant alleges that he was exhausted, manipulated and deceived, and argues that the missing 10-15 minutes of video prior to his re-*Mirandization* is highly suspicious.

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[63] One commentator contends that the length of the interrogation is a factor to be considered when determining the voluntariness of the interrogation because empirical studies have shown that, while most interrogations are brief, those that are known to have produced false confessions are much longer:

> A fourth issue concerns the amount of time suspects spend in the interrogation room, a factor of relevance to evaluating the voluntariness of the statements that are made. Observational studies have suggested that routine interrogations tend to be relatively brief encounters, with the modal duration ranging from 20 minutes to an hour. These findings stand in stark contrast to Drizen and Leo's archival study of 125 proven false confessions, where 34% of interrogations lasted 6 to 12 hours, 39% lasted 12 to 24 hours, and the mean was 16.3 hours. This latter finding is not surprising in light of prominent case studies of false confessions, so many of which were taken at night and after lengthy interrogations.

Saul M. Kassin *et al., Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 Law & Hum. Behav. 381 (2007) (citations omitted). The length of the interrogation in the instant case is sufficient to cause concern although not so long as to place it squarely in the realm of interrogations known to have produced false confessions.

However, a review of the videos shows that, although the defendant expresses a desire to go home and sleep in his own bed, he was provided with water, food, and cigarettes. Although he is visibly distraught during the re-*Mirandization,* he does not appear unduly so nor does he appear distracted or unable to focus. His mental capacity is normal and his mental status is not disputed. Although he is a young adult, he is no longer a juvenile and he is familiar with the criminal justice system. In fact, he comments during the interview that he has spoken with detectives in the past and that he is familiar with the process. Regarding the defendant's claim that he was deceived[64] and his suggestion that undue pressure was brought to bear during the unrecorded interval, the district court, who heard the testimony of all persons involved, explicitly rejected these claims, stating:

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[64] Detectives concede that their interrogation methods included initially minimizing the defendant's role in the crime, and the defendant complains that, at some point, the differences between manslaughter and murder were discussed. However, in *Colorado v. Spring*, supra, 479 U.S. at 577, 107 S. Ct. 851, the Supreme Court noted that "a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." *Cf. State v. Williams*, 521 So. 2d 629, 630-631 (La. App. 1 Cir. 1988) (voluntariness of defendant's statements was not affected by alleged fact that he thought he was under arrest for shooting of police dog and that he had no intent to make a statement concerning charge of attempted first degree murder of a police officer).

> The Court is impressed with Officer Morse's testimony. The Court finds that there is no undue pressure being asserted. By observing the first taped segment and the second taped segment it is apparent that no duress or force by exerted upon this defendant.

The determination of a statement's admissibility is within the trial court's discretion, and it should not be disturbed unless it is unsupported by the evidence. *State v. Seward,* 509 So. 2d 413, 417 (La. 1987); *see also State v. Brooks,* 541 So. 2d 801 (La. 1989) (trial judge's conclusions on the credibility and weight of testimony relating to the voluntariness of a confession for the purpose of admissibility should not be overturned on appeal unless they are not supported by the evidence).

In this case, the defendant controlled the pace and scope of his communications with the police about Ferrari's murder by carefully adjusting his story to conform to the evidence revealed by detectives. He demonstrated his understanding of his *Miranda* rights and his capacity to regard or disregard them of his own volition by invoking his right to the assistance of counsel,[65] which invocation was followed by an immediate retraction. The record otherwise discloses no coercion used by the police to make the defendant change his mind about discussing Ferrari's death and thus fully supports a finding that the defendant made a knowing and voluntary waiver of his *Miranda* rights. Thus, as we found that the retraction itself was voluntary and unprompted by statements designed to elicit such a response, we also find that the defendant validly waived his *Miranda* rights before the resumption of the interview. Accordingly, after careful scrutiny, we find that the subsequent recorded statements were properly admitted at trial and that this assignment of error lacks merit.

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[65] As the Supreme Court has noted, the focus of the voluntariness inquiry is whether "a suspect knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time .... [and most critically] that whatever he chooses to say may be used as evidence against him." *Spring,* 479 U.S. at 574, 107 S. Ct. 851.

Assignment 2. Defendant contends that the district court erred in admitting his handwritten letter to the victim's widow, which he wrote in the absence of legal counsel in the late afternoon of September 10. Defendant refers this Court to the minute entries to show that a 72-hour hearing was held on the morning of September 10, 2002, at which time indigent defense counsel was appointed to represent him, and characterizes this hearing as a critical stage in the prosecution after which time no agent of the state was permitted to communicate with him directly. He further alleges that testimony established that neither he nor the detectives who accompanied him at that time were aware that counsel had been appointed that morning. Under those circumstances, he argues that the state cannot

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The instant defendant clearly demonstrated this understanding.

show that he knowingly and intelligently waived his right to counsel before producing the handwritten letter. Finally, the defendant notes that this handwritten letter was of enough significance to be mentioned in the state's opening remarks.

The state responds that the law is not fully settled on the consequences of a 72-hour hearing under our holdings in *State v. Hattaway,* 621 So. 2d 796 (La. 1993) and *State v. Carter,* 94-2859 (La. 11/27/95), 664 So. 2d 367, and notes further that the defendant only stood in mute acquiescence at this hearing, but argues (assuming that a right to counsel attached at that time) that the defendant validly waived his right to the presence of counsel (after a full *Mirandization*) prior producing the handwritten letter. In the alternative, the state argues, as in the above assignment of error, that the error, if any, in admitting this statement is harmless in light of the other evidence of the defendant's guilt.

The Sixth Amendment right to counsel does not attach until after the initiation of formal charges attaches at the initiation of adversarial judicial criminal proceedings, *United States v. Gouveia,* 467 U.S. 180, 189, 104 S. Ct. 2292, 2298, 81 L. Ed. 2d 146 (1984), whether by way of formal charge, preliminary hearing, indictment, information or arraignment. *Moran v. Burbine,* 475 U.S. 412, 431, 106 S. Ct. 1135, 1146, 89 L. Ed. 2d 410 (1986); *Kirby v. Illinois,* 406 U.S. 682, 689, 92 S. Ct. 1877, 1882, 32 L. Ed. 2d 411 (1972).

In *Hattaway,* this Court held that the right to counsel under La. Art. I, Sec. 13, attaches no later than a defendant's initial court appearance or first judicial hearing and thereafter applies only to those pre-trial proceedings which would be considered "critical stages" under the jurisprudence interpreting the Sixth Amendment. *Hattaway* further held that after the first adverse criminal proceeding and the court's appointment of an attorney, the state cannot obtain a waiver from the accused or otherwise communicate with him with respect to his offense except through counsel. 621 So. 2d at 798.

Two years later, this Court decided *Carter*. In that case, the criminal defendant had appeared in court for an initial appearance, where bond was set and an attorney appointed to represent him. Three days later, the arresting officer met with the defendant in jail, advised him of his rights and asked him if he wanted to make a statement. After signing a form waiving his rights, the defendant made a statement. The trial court denied the defendant's motion to suppress, but this ruling was reversed by the court of appeal based on our holding in *Hattaway*. *State v. Carter,* 94-1387 (La. App. 4 Cir. 11/2/94). Upon review, we reconsidered *Hattaway* and overruled some of its holdings.[66] In particular, we found that *Hattaway's* holding that right to counsel could not be waived after counsel had been appointed at the initial hearing was too broad because it was based on United States Supreme Court jurisprudence that dealt only with covert interrogation of a defendant. 664 So. 2d at 374.[67] We held that where covert interrogations are not involved, the Supreme Court has never held a defendant may not under any circumstance waive his Sixth Amendment right to counsel. *Id.* at 376;*see Patterson v. Illinois,* 487 U.S. 285, 291, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988); *Michigan v. Harvey,* 494 U.S. 344, 352, 110 S. Ct. 1176, 1181, 108 L. Ed. 2d 293 (1990). Instead, we recognized that "although the general rule is that a defendant can make a valid waiver of his right to the assistance of counsel during direct or overt interrogation, even in the absence of his counsel, the United States Supreme Court later created a 'prophylactic rule' for deciding whether an accused who has 'asserted' his Sixth Amendment right to counsel could subsequently be found to have waived that right." *Id.* at 379. This "prophylactic

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[66] This Court opened the door to revisit *Hattaway* at a later date by stating in State v. Carter that "[w]e need not decide today however, whether we were correct in *Hattaway* that an initial appearance under La. C. Cr. P. art. 230.1 marks the 'initiation of adversary judicial criminal proceedings.' "*Carter,* 644 So. 2d at 373. However, this statement of law was not discussed further or overruled. Although *Hattaway* has been refined by State v. Carter, supra, it remains good law in the

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respect that the accused's right to counsel under the Sixth Amendment and La. Const. art. I, § 13 attaches no later than his first appearance before the committing magistrate.

[67] The "covert" interrogation cases upon which the *Hattaway* opinion was based include *Massiah v. United States,* 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964); *McLeod v.Ohio,* 381 U.S. 356, 85 S. Ct. 1556, 14 L. Ed. 2d 682 (1965) (per curiam); *Beatty v. United States,* 389 U.S. 45, 88 S. Ct. 234, 19 L. Ed. 2d 48 (1967) (per curiam); *United States v. Henry,* 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980); and *Maine v. Moulton,* 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985). See also *Kuhlmann v. Wilson,* 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986).

rule" was announced in *Michigan v. Jackson*, where the Supreme Court held that once a defendant's Sixth Amendment right to counsel has attached, if a defendant requests the assistance of counsel or "asserts" his right to counsel, then any subsequent waiver obtained pursuant to police-initiated interrogation will be presumed involuntary, regardless of whether the waiver was actually voluntary, knowing and intelligent. 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986). After concluding that the right to counsel under Art. I, Sec. 13 of the Louisiana Constitution was coextensive with the right to counsel under the Sixth Amendment, and based on United States Supreme Court jurisprudence making clear that a defendant can validly waive his Sixth Amendment right to counsel under certain circumstances, we held:

> Because our constitution can give no less protection than is afforded by the United States Constitution, we are additionally bound by the Court's holding in *Michigan v. Jackson* that once defendant's right to counsel has attached, if he makes an assertion or invocation of this right, any waiver he would later make in response to police-initiated interrogation will be considered invalid, regardless of whether the waiver would normally meet the standards of a knowing, intelligent and voluntary waiver. *Where defendant's right to counsel has attached but he has not made an assertion or invocation of his right to counsel, a waiver in response to police-initiated interrogation can be considered valid provided it is knowing, intelligent, and*

voluntary. (Emphasis added.)
664 So. 2d at 382-83.

In this case, defendant's right to counsel attached at the 72-hour hearing held on the morning of September 10, 2002, at which time indigent defense counsel was appointed to represent him. While the minute entry clearly shows that counsel was appointed, it does not show a response by defendant. The State alleges that the defendant simply stood mute at this hearing and defendant does not allege that he made any statement at this hearing asserting his right to counsel. As we held in *Carter,* "[s]omething more than the mere mute acquiescence in the appointment of counsel is necessary to show the defendant has asserted his right to counsel [to] sufficiently trigger the enhanced protection provided by *Michigan v. Jackson's* prophylactic rule." *Id.* at 383. Thus, we find that although his right to counsel had attached, he did not assert his right to counsel such that the prophylactic rule of *Michigan v. Jackson* would invalidate any waiver he would later make.[68]

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[68] *See also Montoya v. Collins,* 955 F.2d 279 (5th Cir. 1992), reh. denied, 959 F.2d 969, *cert. denied,* 506 U.S. 1036, 113 S. Ct. 820, 121 L. Ed. 2d 692 (1992), where the Fifth Circuit held that not every appointment of counsel by a committing magistrate to protect the accused's interests constitutes a request for, or an assertion of, the right to counsel for purposes of *Michigan v. Jackson.* According to the police officer who attended the defendant's first appearance before the magistrate on a charge of murder, the defendant made no response when informed that the judge would appoint an attorney for him. *Montoyo,* 955 F.2d at 282-83. On direct review, the Texas Court of Criminal Appeals found that the defendant had not

invoked his right to counsel for purposes of *Jackson*, although the magistrate in fact appointed counsel for him, on the basis of a statement by the magistrate "'that he decided to appoint counsel to represent appellant because the appellant was charged with capital murder, not because the appellant requested the assistance of counsel.'" *Id.*, 955 F.2d at 282 (citation omitted). In affirming the district court's denial of federal habeas corpus relief, the Fifth Circuit observed that:

> The rule of *Jackson* is invoked by the defendant's 'assertion ... of the right to counsel.' This language connotes an actual, positive statement or affirmation of the right to counsel. At no time did Montoya make such a statement or affirmation-as the state court found, he did not request counsel, and he said nothing at all when the magistrate appointed counsel for him. We do not say that by his silence Montoya "waived any of his rights, for at any time subsequent to his appearance before the magistrate, including during his interrogation, Montoya could have asked to see a lawyer and *Jackson* would have barred any further police-initiated interrogation. Rather, Montoya never asserted, or invoked, his right to counsel in the first place.... For purposes of *Jackson* an 'assertion' means some kind of positive statement or other action that informs a reasonable person of the defendant's 'desire to deal with the police only through counsel.' This holding does not require a defendant to utter the magic words, 'I want a lawyer,' in order to assert his right to counsel. As Montoya points out, the Supreme Court 'give[s] a broad, rather than a narrow, interpretation, to a defendant's request for counsel.' *Connecticut v. Barrett*, 479 U.S. 523, 529, 107 S. Ct. 828, 832, 93 L. Ed. 2d 920 (1987). But interpretation, whether broad or narrow, is only required when there is a 'request' or an 'assertion' in the first place."

Id., 955 F.2d at 283.

Because defendant had not asserted his right to counsel, the only remaining inquiry is whether his Sixth Amendment waiver was knowing, intelligent and voluntary. *Id.* at 385 ("For the fruits of interrogations occurring after the attachment of the right to counsel ... to be admissible in the prosecution's case in chief, the State must prove a voluntary, knowing, and intelligent waiver of the right to counsel."(citing *Michigan v. Harvey, supra*)). There is no dispute that defendant was given his *Miranda* warnings, and that he signed a waiver of these rights, prior to the September 10 excursion to look for the murder weapon, during which time he wrote the apology letter to Mrs. Ferrari. However, defendant argues that his "waiver" was not a knowing waiver because he was unaware an attorney had been appointed at the 72-hour hearing. Further, he testified at trial as follows:

> They asked me if I would come with them to go clear up where I threw the gun at. So I said, Well, and I don't, I don't, I don't really want to go with you. He said, Do you have a lawyer? I said, yeah, I got a lawyer appointed to me. He said, No, no, you don't. I said, Yeah, I think I got a lawyer appointed to me, and I guess that's where I messed up, when I said I think I got a lawyer appointed to me. He said, No, you don't. He said, I checked, you don't have a lawyer appointed to you.[69]

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[69] Even if defendant's statement is true and the police did tell defendant he did not have a lawyer, this does not rise to the level of the facts presented in *Moran v. Burbine, supra.* In that

Detective Hall testified that when he first approached defendant prior to the car ride, he was not aware that he had been appointed counsel earlier that morning and defendant told him he had not been contacted by an attorney. Defendant argues that his waiver could not have been "knowing" since he did not know he had been appointed an attorney.

In *Patterson v. Illinois, supra,* the Supreme Court validated statements the defendant made to police after he had been indicted for murder, at which time he was entitled to counsel under the Sixth Amendment. There, the Court stated that the key inquiry in such a case must be:

> Was the accused, who waived his Sixth Amendment rights during postindictment questioning, made sufficiently aware of his right to have counsel present during the questioning, and of the possible consequences of a decision to forgo the aid of counsel?

487 U.S. at 292-93, 108 S. Ct. 2389. The Court then considered that *Miranda* warnings had been given to the defendant before he made his statement postindictment and held that "the *Miranda* warnings given petitioner made him aware of his right to have

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case, the United States Supreme Court permitted a *Miranda* waiver to stand under the Sixth Amendment where a suspect was not told that his lawyer was trying to reach him during questioning and the lawyer was told by police that the defendant would not be questioned without the lawyer's presence.

counsel present during the questioning" and "served to make petitioner aware of the consequences of a decision by him to waive his Sixth Amendment rights during postindictment questioning." *Id.* In *Carter,* we relied on *Patterson* in holding that "in the context of the waiver of the right to counsel in an interrogation, *Miranda* warnings given to a defendant prior to his making a statement will suffice to meet the state's burden of proving the statement was given as a result of a knowing and intelligent waiver of the Sixth Amendment and La. Const. Art. I, Sec. 13 right to counsel." *Id.* at 386. Here, although defendant, and even the police may not have been aware that defendant had been appointed counsel, the giving of *Miranda* warnings and his subsequent waiver of those rights was sufficient to apprise him of his right to have counsel present at the interrogation and the consequences of a decision to proceed without the aid of counsel. *See Patterson, supra,* 487 U.S. at 292, 108 S. Ct. 2389;*Carter, supra* at 385. Further, at the 72-hour hearing he was told that counsel was being appointed for him. Thus, we find that defendant's waiver was knowing, intelligent, and voluntary, and that the apology letter was properly admitted by the trial court.[70] This assignment of error lacks merit.

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[70] The defendant does not argue that the waiver was not voluntary.

Passion, Prejudice, or Other Arbitrary Factors.

In discharging its duty imposed by the legislature to "review every sentence of death to determine if it is excessive," La. C. Cr. P. art. 905.9, this Court will review the record in a capital case to determine: (1) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors; (2) whether the evidence supports the jury's finding of a statutory aggravating circumstance; and (3) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. La. S. Ct. Rule 28, § 1. In the present case, Rule 28 review demonstrates that defendant's death sentence is not excessive.

Defendant argues that the death sentence is constitutionally excessive due to the following: the total absence of any presentation of mitigating evidence during the penalty phase of the trial, making meaningful sentence review impossible; the prejudice that resulted from the introduction of graphic autopsy photographs, improper "victim impact evidence" during the guilt phase of the trial, and the arbitrariness created by the trial court's frequent admonitions to speed the proceedings along; and numerous substantial errors occurring at trial. First of all, given that it was defendant's burden to present mitigating evidence, the fact that none was presented will not prevent a death penalty from being imposed.[71] Further, although the crime scene and autopsy photographs were gruesome, their probative value outweighed any prejudicial effect that may have resulted. Regarding the victim's wife testimony at trial, this testimony did not rise to the level of "victim impact evidence" which is generally not admissible during the penalty phase. Finally, there is no merit to the defendant's argument that the trial judge's remarks to speed things along injected an arbitrary factor into the proceedings because the jury could clearly see that the trial judge was proceeding with careful deliberation reflecting the importance of a capital case. Beyond those issues, the record does not show any indicia of passion, prejudice, or arbitrariness. Defendant, a white male, killed a white male victim and received a sentence of death from a jury, during the selection of which no *Batson* or reverse-*Batson* claim was raised. Nothing in the record suggests race was an issue in the trial.

Aggravating Circumstances.

As demonstrated by the jury's verdict during the guilt phase of the trial, the state presented sufficient evidence to prove beyond a reasonable doubt that defendant was engaged in the perpetration of an armed robbery and an attempted armed robbery when he killed the victim. A review of the record shows that the evidence was sufficient to support such a determination.

---

[71] Defendant is not alleging an ineffective assistance of counsel claim at this time. Thus, cases finding that failure to present mitigating evidence constitutes ineffective assistance of counsel in a capital case are inapplicable. *See Williams v. Taylor*, 529 U.S. 362, 398, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005).

Proportionality.

The federal Constitution does not require a proportionality review. *Pulley v. Harris,* 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). However, comparative proportionality review remains a relevant consideration in determining the issue of excessiveness in Louisiana, *State v. Burrell,* 561 So. 2d 692 (La. 1990), *cert. denied,* 498 U.S. 1074, 111 S. Ct. 799, 112 L. Ed. 2d 861 (1991); *State v. Wille,* 559 So. 2d 1321 (La. 1990); *State v. Thompson,* 516 So. 2d 349 (La. 1987), *cert. denied,* 488 U.S. 871, 109 S. Ct. 180, 102 L. Ed. 2d 149 (1988), although the Court has set aside only one death penalty as disproportionately excessive under the post-1976 statutes, finding in that one case, *inter alia,* a sufficiently "large number of persuasive mitigating factors." *State v. Sonnier,* 380 So. 2d 1, 9 (La. 1979); *see also State v. Weiland,* 505 So. 2d 702, 707-10 (La. 1987) (in case reversed on other grounds, dictum suggesting that death penalty disproportionate).

The Uniform Capital Sentence Report reveals that defendant is a white male born on May 11, 1979. He was 23 years old at the time of the offense and is now 28 years old. He did not graduate from high school, nor did he obtain a GED during his juvenile incarceration in Florida, which began when he was

18 years old and lasted for 6 years. Experts agree that he suffers from anti-social personality disorder but is otherwise free from abnormal mental functioning. Following his release from prison in Florida, he was briefly employed in roofing work until quitting his job to work as a driver for his co-defendant. The extensive list of offenses to which he pled guilty as a juvenile are enumerated in footnote 11 of the unpublished appendix.

Since 1976 there have been 24 successful prosecutions for first degree murder in the 22nd Judicial District Court which comprises the parishes of St. Tammany and Washington. Of these cases, jurors have returned the death penalty nine times, excluding the instant case. However, three of these cases resulted in the annulment of the death penalty and the imposition of a life sentence.[72] In three others, the jury returned armed robbery and heinousness as aggravating factors. The most recent case is that of David Wilson who fatally shot a motorist for gas money. *State v. Wilson,* 467 So. 2d 503 (La. 1985), *cert. denied,* 474 U.S. 911, 106 S. Ct. 281, 88 L. Ed. 2d 246 (1985). The federal Fifth

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[72] *See State v. Hart,* 96-0697 (La. 3/7/97), 691 So. 2d 651 (first degree murder conviction and death sentence set aside with instructions for trial court to enter judgment of second degree murder and sentence of life imprisonment); *State v. Willie,* 360 So. 2d 813 (La. 1978) (first degree murder conviction affirmed, death sentence vacated and remanded for imposition of life sentence); *State v. Clark, Jr.,* 340 So. 2d 208 (La. 1976), *cert. denied,* 430 U.S. 936, 97 S. Ct. 1563, 51 L. Ed. 2d 782 (1977) (first degree murder convictions affirmed, death sentences annulled and remanded for imposition of life sentences).

Circuit subsequently granted relief on his ineffectiveness claim which resulted in a stipulation, conditioned on the defendant waiving his right to appeal, that he would receive a life sentence. *Wilson v. Butler,* 825 F.2d 879 (5th Cir. 1987), *cert. denied,* 484 U.S. 1079, 108 S. Ct. 1059, 98 L. Ed. 2d 1021 (1988). His co-defendant, Larry Taylor, received a life sentence following his conviction for first degree murder. *State v. Taylor,* 469 So. 2d 46 (La. App. 1 Cir.1985). The next case is that of David Rushing who robbed and killed a cab driver with a shotgun. *State v. Rushing,* 464 So. 2d 268 (La. 1985), *cert. denied,* 476 U.S. 1153, 106 S. Ct. 2258, 90 L. Ed. 2d 703 (1986). His death sentence was later vacated by the federal Fifth Circuit based on the improper introduction of victim impact evidence. He is now serving a life sentence without benefit of parole, probation, or suspension of sentence. *Rushing v. Butler,* 868 F.2d 800 (5th Cir. 1989). Rushing's co-defendant, Jeffrey Fussell, pled guilty and was sentenced to life imprisonment. *Rushing,* 464 So. 2d at 271 n.2. The third case involves Frederick Kirkpatrick, who robbed and killed an elderly man by striking him in the head with a heavy glass object, implanting a butcher knife into the victim's chest, and shooting him in the head. *State v. Kirkpatrick,* 443 So. 2d 546 (La. 1983). The federal Fifth Circuit remanded his case for a hearing based on a *Brady* violation; the state and defense subsequently stipulated to a life sentence. *Kirkpatrick v. Butler,* 870 F.2d 276 (5th Cir. 1989), *cert. denied,* 493 U.S. 1051, 110 S. Ct. 854, 107 L. Ed. 2d 848 (1990). His co-defendant was convicted of second degree murder and sentenced to life imprisonment without benefit of parole, probation, or suspension of sentence. *State v. Faulkner,* 447 So. 2d 1139 (La. App. 1 Cir. 1984), *writ denied,* 449 So. 2d 1345 (La. 1984).

Finally, in one instance, a jury recommended death after finding the sole aggravating circumstance of armed robbery. In that case, co-defendants Roy Clark, Jr. and Brent Mikell, were accused of shooting the victim during an attempted armed robbery. Their death sentences were subsequently set aside and the trial court imposed life sentences. *State v. Clark, Jr.,* 340 So. 2d 208 (La. 1976).

Although several capital verdicts from St. Tammany and Washington Parishes were ultimately set aside, a review of those cases does not suggest that the defendant received a disproportionately harsh sentence in this case. Further, a state-wide review of cases reflects that jurors often return the death penalty when innocent adult victims have been robbed or raped and murdered in or near their home or car. *See State v. Robertson,* 97-0177 (La. 3/4/98), 712 So. 2d 8, *cert. denied,* 525 U.S. 882, 119 S. Ct. 190, 142 L. Ed. 2d 155 (1998); *State v. Tart,* 92-0772 (La. 2/9/96), 672 So. 2d 116, *cert. denied,* 519 U.S. 934, 117 S. Ct. 310, 136 L. Ed. 2d 227 (1996); *State v. Burrell,* 561 So. 2d 692 (La. 1990), *cert. denied,* 498 U.S. 1074, 111 S. Ct. 799, 112 L. Ed. 2d 799 (1991); *State v. Eaton,* 524 So. 2d 1194 (La. 1988), 488 U.S. 1019, 109 S. Ct. 818, 102 L. Ed. 2d 807 (1989); *State v. Wingo,* 457 So. 2d 1159 (La. 1984), *cert. denied,* 471 U.S. 1030, 105 S. Ct. 2049, 85 L. Ed. 2d 822 (1985); *State v. Glass,* 455 So. 2d 659 (La. 1984), *cert.*

denied, 471 U.S. 1080, 105 S. Ct. 2159, 85 L. Ed. 2d 514 (1985); *State v. Celestine,* 443 So. 2d 1091 (La.1983), *cert. denied,* 469 U.S. 873, 105 S. Ct. 224, 83 L. Ed. 2d 154 (1984); *State v. Narcisse,* 426 So. 2d 118 (La. 1983), *cert. denied,* 464 U.S. 865, 104 S. Ct. 202, 78 L. Ed. 2d 176 (1983).

Furthermore, as noted above, at the time of the offense, defendant was 23 years old and we have previously affirmed death verdicts for defendants younger than this. *State v. Craig,* 95-2499 (La. 5/29/97), 699 So. 2d 865,*cert. denied,* 522 U.S. 935, 118 S. Ct. 343, 139 L. Ed. 2d 266 (1997); *State v. Comeaux,* 93-2729 (La. 7/1/97), 699 So. 2d 16, *cert. denied,* 522 U.S. 1150, 118 S. Ct. 1169, 140 L. Ed. 2d 179 (1998); *State v. Prejean,* 379 So. 2d 240 (La. 1979), *cert. denied,* 449 U.S. 891, 101 S. Ct. 253, 66 L. Ed. 2d 119 (1980). Compared to these cases, it cannot be said that the death sentence in this case is disproportionate.

DECREE

For the reasons assigned herein, the defendant's conviction and death sentence are affirmed. In the event this judgment becomes final on direct review when either: (1) the defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that Court denies his petition for certiorari; and either (a) the defendant, having filed for and been denied certiorari, fails to petition the United States Supreme Court timely, under its prevailing rules, for rehearing of denial of certiorari; or (b) that Court denies his petition for rehearing, the trial judge shall, upon receiving notice from this Court under La. Code Crim. Proc. Art. 923 of finality of direct appeal, and before signing the warrant of execution, as provided by La. R.S. 15:567(B), immediately notify the Louisiana Indigent Defense Assistance Board and provide the Board with reasonable time in which: (1) to enroll counsel to represent the defendant in any State post-conviction proceedings, if appropriate, pursuant to its authority under La. R.S. 15:149.1; and (2) to litigate expeditiously the claims raised in that original application, if filed in the state courts.

AFFIRMED.

Appendix B

STATE OF LOUISIANA
NUMBER 355706
DIVISION H

VERSUS
22ND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY

JESSE JAY MONTEJO
STATE OF LOUISIANA

FILED: March 9, 2005
DEPUTY CLERK: Bridget Dickerson

POSSIBLE VERDICTS

GUILTY;

GUILTY OF SECOND DEGREE MURDER;

GUILTY OF MANSLAUGHTER;

NOT GUILTY

SCANNED
JUN - 9 2005

VERDICT OF THE JURY

WE, the jury, find the defendant: JESSE JAY MONTEJO

Guilty

FOREPERSON William L. Phillips

March 9th 2005

DATE

COVINGTON, LOUISIANA

SCANNED
JUN - 9 2005

Appendix C

STATE OF LOUISIANA

VERSUS

JESSE JAY MONTEJO

NUMBER 355706
DIVISION H
22ND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA

FILED: March 10, 2005

DEPUTY CLERK:

VERDICT FORM

Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury unanimously determines that the defendant should be sentenced to death.

Aggravating circumstance or circumstances found:

① THE OFFENDER WAS ENGAGED IN THE PERPETRATION OF ARMED ROBBERY.

② THE OFFENDER WAS ENGAGED IN THE PERPETRATION OF AGGRAVATED BURGLARY.

William L. Phillips
FOREPERSON WILLIAM L. PHILLIPS

MARCH 10, 2005
DATE

SCANNED
JUN - 9 2005

Appendix D

Tuesday, September 10, 2002

COURT MET THIS DAY PURSUANT TO ADJOURMENT, PRESENT AND PRESIDEING, HIS HONOR, JAMES J. GLEASON, III, COMMISSIONER; WALTER P. REED, DISTRICT ATTORNEY, RODNEY J. STRAIN, SHERIFF AND MALISE PRIETO, CLERK OF COURT

72-26002 STATE OF LOUISIANA
VS
JESSE J. MONTEJO

The defendant being present and this matter came before the Court for Seventy-Two Hour Hearing to determine bond and Counsel. The defendant being charged with First Degree Murder, Court ordered No. Bond set in this matter. Further, Court ordered the Office of Indigent Defender be appointed to represent the defendant.

COURT ADJOURNED SINE DIE

MINUTE CLERK DGBdgb

MINUTES READ AND APPROVED

COMMISSIONER JJG/jjg

A TRUE EXTRACT OF THE MINUTES OF THIS COURT

____
DEPUTY CLERK
22ND JUDICIAL DISTRICT COURT
ST. TAMMANY PARISH, LOUISIANA

Appendix E

Twenty-Second Judicial District Court
Parish of St. Tammany
State of Louisiana.

STATE of Louisiana
v. No. 355706
Jesse Jay MONTEJO.

****

TRANSCRIPT OF PROCEEDINGS taken before the Honorable Donald M. Fendlason, Judge Presiding, Division "H", Twenty-Second Judicial District Court, Parish of St. Tammany, State of Louisiana, on Friday, May 13, 2005, in Covington, Louisiana.

APPEARANCES:

RONALD T. GRACIANETTE, ESQ.
SCOTT C. GARDNER, ESQ.
(ASSISTANT DISTRICT ATTORNEY)

JAMES A. WILLIAMS, ESQ.
(ATTORNEY FOR JESSE JAY MONTEJO)

Page 2

PROCEEDINGS

BY ATTY ONE:

We would like to take up the matter of State versus Jesse Montejo, Docket Number 355706. Please bring Mr. Montejo out. Ronnie Grancianette representing the State.

BY ATTY TWO:

Jim Williams on behalf of Mr. Montejo, who is present before the court.

BY THE COURT:

Did you make your appearance, Mr. Gracianette?

BY ATTY ONE:

Yes, sir. Ronnie Gracianette representing the State.

BY THE COURT:

Okay. Mr. Williams, I believe you filed a motion in connection with this matter.

BY ATTY TWO:

I did, Your Honor. And I have served a copy of that motion on the State and with the Court. And I attached a memorandum. And I would submit that motion on my memorandum.

BY THE COURT:

The motion for new trial has been submitted; is that correct?

BY ATTY TWO:

Yes, sir.

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BY THE COURT:

I read the memorandum. At this time, the Court denies the motion for a new trial.

BY ATTY TWO:

Respectfully note my objection, Your honor.

BY THE COURT:

Are you prepared to move forward sentencing?

BY ATTY TWO:

Yes, sir. We would waive any delays that we would otherwise be entitled to.

BY THE COURT:

Let the record reflect the defendant is here present, along with his counsel. And also a representative of the State. What is your age, please?

BY MR. MONTEJO:

26.

BY THE COURT:

The defendant, stating that he is 26 years of age, the defendant was previously found guilty by a jury on March 9, 2005, in violation of Revised Statute 14: --

BY ATTY ONE:

14:30.

BY THE COURT:

Thank you. First degree murder. As indicated by counsel for the defendant, sentencing delays have been waived. The defendant is now being sentenced in accordance with the sentencing provisions of Code of Criminal Procedure Article 905.8 and 905.7. Code of Criminal Procedure 905.8 provides that the Court shall sentence the defendant in accordance with the determination of the jury.

Article 905.7 provides that the form of jury determination shall be as follows. Having found the below listed statutory aggravating circumstances, circumstance or circumstances, and after consideration of mitigating circumstances offered, the jury unanimously determines – determined that the defendant should be sentenced to death.

The aggravating circumstances found are as follows: The offender was engaged in the perpetration of armed robbery; the offender was engaged in the perpetration of aggravated burglary. Does the victims in this case desire to make a statement?

BY ATTY ONE:

Your Honor, both the victim's representative are present. And they have declined to make any formal statements.

BY THE COURT:

Does the defendant desire to make a statement?

BY ATTY TWO:

No, sir.

BY THE COURT:

That being the case, the court

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sentence the defendant, Jesse Jay Montejo, to death in accordance with the laws of the State of Louisiana. Any other motions or matters to come before the court?

BY ATTY TWO:

Your Honor, I believe Mr. Montejo is entitled to an automatic appeal to the Louisiana Supreme Court. I'll file a written motion to that.

BY THE COURT:

Thank you. Let that be done.

BY ATTY TWO:

Thank you, Judge.

BY THE COURT:

Any other matters in connection with this matter?

BY ATTY ONE:

No, sir.

BY THE COURT:

The defendant is remanded back to the custody of the authorities.

OPPOSITION BRIEF

98

②

FILED

JUL 9 - 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1529

In the Supreme Court of the United States

JESSE JAY MONTEJO
Petitioner

v.

STATE OF LOUISIANA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KATHRYN LANDRY
Counsel of Record
SPECIAL APPEALS COUNSEL
FOR WALTER P. REED,
DISTRICT ATTORNEY
POST OFFICE BOX 82659
BATON ROUGE, LA 70884
TELEPHONE: (225) 766-0023

Counsel for Respondent, State of Louisiana

LEGAL PRINTERS, Washington DC • 202-747-2400 • legalprinters.com

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La.C.Cr.P. Art. 230.1 8

STATEMENT OF THE CASE

A. *State Court Proceedings*

Defendant herein, Jesse J. Montejo, (hereinafter referred to as "Montejo") and another individual, Jerry Moore, were indicted on October 24, 2002 by a grand jury for the first degree murder of Louis Ferrari, who was found by his wife after being murdered in their home on September 5, 2002. The trials of the two individuals, Montejo and Jerry Moore, were severed pursuant to a defense motion.

The defendant herein, Montejo, proceeded to trial, and a jury found Montejo guilty of first degree murder on March 9, 2005. Following the penalty phase, which was held on March 10, 2005, the jury determined that Montejo should be sentenced to death. Montejo's conviction and sentence were affirmed by the Louisiana Supreme Court on January 16, 2008, and his request for rehearing was denied on March 7, 2008.

Montejo has now petitioned this Honorable Court, arguing that his Sixth Amendment rights were violated when the police interrogated him after his right to counsel had attached and counsel had been appointed to represent him. Montejo argues that a letter he wrote to the victim's widow, which was introduced into evidence at the trial, was obtained in violation of his Sixth Amendment rights and should have been excluded from evidence.

For the reasons stated herein, the State submits that the Petition for Writ of Certiorari filed herein by Jesse Montejo should be denied. While the State submits that Montejo's claim should fail on the merits, the State further submits that any error in the introduction of the statement at issue was harmless in light of the other evidence, which is not the subject of this application and which overwhelmingly proved Montejo's guilt.

B. *Facts*

On September 5, 2002, Lou Ferrari was murdered in his home in St. Tammany Parish. Lou Ferrari was found in the kitchen of his home by his wife, Pat Ferrari. Lou Ferrari had suffered two gunshot wounds, one to the right chest area and one to the right eye. (Testimony of Dr. Michael Difatta, Record at p. 2268 and 2272). The wound to the chest was determined to be a contact wound, meaning the gun was in contact with Mr. Ferrari's body when it was fired. However, the gunshot wound to the chest exited Mr. Ferrari's body and was a non-fatal injury. (Testimony of Dr. Michael Difatta, Record at pp. 2269–2270). The gunshot wound to the right eye resulted in a complete destruction of the right eye. The bullet traveled through the eye, then through the right base of the brain, and exited the back of Mr. Ferrari's skull. This gunshot wound was fatal within a matter of seconds. (Testimony of Dr. Michael Difatta, Record at pp. 2272-2273).

The Ferrari family operated a dry-cleaning business for approximately 26 years, operating ten stores in the area at the time of Mr. Ferrari's murder. Lou Ferrari's wife, Pat, and son, Louis, worked with him in the business. Montejo was an acquaintance/friend of Jerry Moore[1], who had performed mechanical work on the equipment at the Ferrari stores for a number of years.

Montejo was known to drive a blue van, which was his mode of transportation in driving Moore. (Testimony of Louis Ferrari, III, Record at pp. 2428). The blue van was apparently quite distinctive, with a "cattle guard" on the front. (Testimony of Stacy Stubbenville, Record at pp. 2438-2439). Defendant was placed at the scene of the murder at the approximate time of the murder by neighbors of the Ferraris who recalled this van. In addition to the foregoing, the investigating officers and crime scene personnel collected fingernail scrapings from Lou Ferrari. Photographs were taken of defendant, which showed abrasions on his neck. (Testimony of Detective Jerry Hall, Record at pp. 2712-2713). Dr. Sudhir Sinha, an expert in molecular biology and DNA, performed the DNA testing on these scrapings. Dr. Sinha testified that the DNA in the left fingernail scrapings resulted from an intentional scratch and was not the result of minor contact, such as shaking hands. According to Dr. Sinha, there was a high degree of certainty, the chance of a random match being 1 in 163 billion, that the DNA found in the fingernail scrapings from the victim matched defendant. (Testimony of Dr. Sudhir Sinha, Record at pp. 2623-2632).

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[1] As a result of his role in the murder of Lou Ferrari, Jerry Moore was charged with and convicted by a jury of second degree murder under Louisiana law. Jerry Moore was not present at the time of the murder and did not discharge the weapon. He later identified Montejo as the shooter. Moore was sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. The conviction and sentence of Moore was affirmed by the Louisiana First Circuit Court of Appeal, Docket no. 2006 KA 1979, and the Louisiana Supreme Court denied his writ application.

Once Mr. Ferrari entered his home that afternoon, he had no means of escaping Montejo, intent on getting the money he wanted. The testimony of the Chief Deputy Coroner, Dr. Michael Difatta, established that the gunshot wound to Mr. Ferrari's eye would have resulted in almost instantaneous death, dropping the victim "right there". (Testimony of Dr. Michael Difatta, Record at p. 2273). The crime scene photographs showed the position of Mr. Ferrari, demonstrating that the victim was cornered by Montejo when he was shot and killed.

Defendant testified at the trial and admitted he was at the Ferrari house when Lou Ferrari was murdered, although he claimed that he was there by virtue of an invitation from Mr. Ferrari. Defendant claimed at trial that a black male who he could only identify as D.P. was the murderer. However, Montejo had previously confessed in a videotaped interview with police. As the Louisiana Supreme Court noted in its decision, the story he gave at trial was the seventh version of the crime given by Montejo, which was "an elaborated variation" of the fifth version. (Pet. App., p. 18a). Montejo, as detailed below, had an extensive criminal history. During the interrogation, he appeared to be a savvy ex-con, who was trying to read the police, attempting to determine how much they knew as he spoke with them. He gave the police bits and pieces of information, which gradually increased until he confessed to shooting Mr. Ferrari, although, even then, he tried claiming accident and a third party's involvement to minimize his role and intent in the crime. As the Louisiana Supreme Court noted, the jury watched approximately four hours of the videotaped police interrogation of Montejo, "during which Montejo slowly made increasingly incriminating statements until he finally admitted that he shot the victim, who had unexpectedly returned home and interrupted Montejo's burglary." (Pet. App. 9a).

Montejo further testified at trial to his extensive criminal history from Florida, particularly with regard to burglary and robbery, and his prior convictions are as follows:

Docket No. 963783:	Theft, burglary
Docket No. 962944:	Armed burglary, criminal mischief
Docket No. 962945:	Burglary, petty theft
Docket No. 962723:	Burglary, grand theft
Docket No. 962946:	Armed burglary, burglary, grand theft
Docket No. 963343:	Armed burglary
Docket No. 963342:	Burglary, petty theft
Docket No. 963226:	Armed burglary, theft
Docket No. 963227:	Burglary, grand theft
Docket No. 963228:	Burglary, grand theft
Docket No. 963341:	Armed burglary, grand theft
Docket No. 962344:	Burglary, grand theft
Docket No. 960294:	Armed burglary, burglary

With respect to the letter which is at issue in this Petition, a hearing was held on defendant's motion to suppress. Detective Jerry Hall testified that on the morning of September 10, 2002[2], this follow-up was an effort to locate the gun that had been used in the crime and the money bag taken from Mr. Ferrari. The police already had Montejo's videotaped confession. In fact, Montejo had provided the police, during that confession, with an approximate area where he had thrown the gun into Lake Ponchartrain, the largest lake in Louisiana, consisting of approximately 600 square miles. Montejo had told the officers in his confession that he just went to the home for a burglary, not murder, and that the gun he used belonged to Mr. Ferrari. Apparently, in his attempt to further exculpate himself, he told the officers he wanted to help them find the gun to prove he was telling the truth. (Testimony of Det. Wade Major, Record at p. 967).

The police had divers in the lake, but had been unable to locate the weapon. Detective Hall approached Montejo, because Montejo had previously offered to help locate the gun and asked Montejo if he would accompany them to the bridge and assist in further pinpointing the area where he disposed of the gun, to which Montejo consented, without issue. Although defendant alleges, citing his own testimony at trial, that he told Detective Hall that he had a lawyer appointed to him that morning, defendant's testimony directly contradicts the testimony of the officers. Detective Jerry Hall testified that he asked Montejo that morning if he had been contacted by an attorney, to which Montejo responded that he had not. (Testimony of Detective Jerry Hall, Record at p. 999). Montejo not only did not tell the officers that counsel had been appointed, but he unequivocally denied having a lawyer when directly asked by Detective Hall. In fact, Montejo told the detectives he just wanted to clear this up and never requested a lawyer. (Testimony of Detective Jerry Hall, Record at p. 1002). As the Louisiana Supreme Court found, "there is no dispute that defendant was given his *Miranda* warnings and that he signed a waiver of these rights prior to the September 10 excursion to look for the murder weapon, during which time he wrote the apology letter to Mrs. Ferrari." (Pet. App. 49a).

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[2] Originally, Detective Hall referred to this contact as occurring on September 9, 2002, but later corrected this reference to September 10, 2002. The original reference to September 9 was simply an error. (Testimony of Detective Jerry Hall, Record at p. 1016).

ARGUMENT

A. *The Ruling of the Louisiana Supreme Court Was in Accordance with the precedent of this Honorable Court*

1. Facts Relevant to Sixth Amendment Issues

The minute entries from this proceeding reflect that a seventy-two (72) hour hearing, pursuant to Louisiana law, was held on the morning of September 10, 2002. La.C.Cr.P. art. 230.1 provides that the sheriff or law enforcement officer having custody of an arrested person shall bring him promptly, and in any case within seventy-two hours from the time of the arrest, before a judge for the purpose of appointment of counsel, and the judge may also determine or review a prior determination of the amount of bail. The minute entry from that seventy-two hour hearing is included in Petitioner's Appendix D, p. 63a, and provides that the defendant was present, and further provides that no bond was set, the defendant, being charged with first degree murder, and the "court ordered the Office of Indigent Defender be appointed to represent the defendant".

Prior to this date, the police already had Montejo's videotaped confession, which was admitted at trial, and which is not the subject of this petition. During that confession, Montejo had provided the police with an approximate area where he had thrown the gun into Lake Ponchartrain, the largest lake in Louisiana, consisting of approximately 600 square miles. During his confession, Montejo told the officers that he just went to the home for a burglary, not murder, and that the gun he used belonged to Mr. Ferrari. Apparently, in his attempt to further exculpate himself, he told the officers he wanted to help them find the gun to prove he was telling the truth. (Testimony of Det. Wade Major, Record at p. 967).

The police had divers in the lake, but had been unable to locate the weapon. They were working with a large grid, and Lake Ponchartrain can be a treacherous and dangerous body of water. Detective Hall approached Montejo, because Montejo had previously offered to help locate the gun and asked Montejo if he would accompany them to the bridge and assist in further pinpointing the area where he disposed of the gun, to which Montejo consented, without issue.

Although defendant alleges, based upon his own testimony at trial, that he told Detective Hall that he had a lawyer appointed to him that morning, defendant's testimony directly contradicts the testimony of the officers. Detective Jerry Hall testified that he asked Montejo that morning if he had been contacted by an attorney, to which Montejo responded that he had not. (Testimony of Detective Jerry Hall, Record at p. 999). Not only did Montejo not ask for the help of a lawyer, he specifically denied having a lawyer. In fact, Montejo told the detectives he just wanted to clear this up and never requested a lawyer. (Testimony of Detective Jerry Hall, Record at p. 1002). As the Louisiana Supreme Court found, "there is no dispute that defendant was given his *Miranda* warnings and that he signed a waiver of these rights prior to the September 10 excursion to look for the murder weapon, during which time he wrote the apology letter to Mrs. Ferrari." (Pet. App. 49a). In the letter, Montejo attempts to excuse his actions, in yet another exculpatory attempt.

2. *Montejo's Sixth Amendment Rights Were Not Violated*

The Sixth Amendment right to counsel is triggered at or after the time judicial proceedings have been initiated, whether by way of formal charge, preliminary hearing, indictment, information or arraignment. *Fellers v. United States*, 540 U.S. 519, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004).

The Louisiana Supreme Court held in this case that the seventy-two hour hearing on September 10, 2002 marked the initiation of adverse criminal proceedings, and in this case, Montejo's right to counsel attached at that hearing. (Pet. App., p. 47a). The State submits that the issues then become whether the police interrogated or "deliberately elicited" incriminating statements from Montejo after that hearing, whether Montejo asserted or exercised his right to counsel, and whether the waiver of his rights was valid.

In *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), this Honorable Court held that if police initiate interrogation *after a defendant's assertion* at an arraignment or similar proceeding of his right to counsel, any waiver of the defendant's right to counsel for that police initiated interrogation is invalid. The first issue is whether the actions at issue herein constituted an "interrogation" or "deliberate elicitation" of incriminating words by police. The State submits that Montejo had already confessed on videotape, had provided a general description of the location where he threw the gun into the lake and told the police he wanted to find the gun to prove the fact that he was not armed when he entered the home. The officers testified that Montejo asked them for a pen and paper, and he wrote the letter to Mrs. Ferrari without any promises or coercion. (Testimony of Det. Jerry Hall, Record at p. 2723). Accordingly, the State submits the officers did not interrogate or deliberately elicit any statements from Montejo. This letter was written by Montejo as yet another attempt to minimize his actions.

In addition, in *Michigan v. Jackson, supra*, the record reflected that the defendant had "requested" that counsel be appointed for him at his arraignment. While in footnote 6 of that ruling this Court stated that it was not suggesting that the right to counsel turned on such a request, the Court also stated that the defendant's *request* for counsel was an "extremely important fact" in considering the validity of a subsequent waiver in response to police initiated interrogation. *See Michigan v. Jackson, supra* at p. 633. It is clear from the Court's statements therein that an affirmative request by a defendant for counsel should be considered. In the case presently before this Honorable Court, there was no such request. The officers clearly testified that Montejo never mentioned to them he had an attorney, and in fact, one of the detectives specifically asked Montejo if he had an attorney, to which Montejo responded negatively. The officers did not attempt to ignore any request by Montejo for counsel. They actively inquired of Montejo whether he had counsel, and it was Montejo who denied having counsel. Moreover, the minute entry of the hearing does not reflect a request by Montejo for counsel. The state court merely refused to set bond and appointed the public defender to represent Montejo.

As stated above, on the morning in question, the detectives were trying to follow up to locate the gun used to kill Mr. Ferrari. Montejo had already confessed at this point in a videotaped interview, given a general description of the area where he threw the gun and offered to help find the gun. However, Lake Ponchartrain is the largest lake in Louisiana, covering approximately 600 square miles. The officers had been unable to find the gun based upon Montejo's verbal description, so they asked him to accompany them to point out the area where he threw the gun. Montejo voluntarily accompanied the officers. (Testimony of Det. Jerry Hall, Record at pp. 987-990). While in the car, Montejo asked for a pen and paper and wrote an apology letter to Mrs. Ferrari. According to the officers, they did not tell him to write the letter and did not direct him on what to include in the letter. (Testimony of Det. Jerry Hall, Record at p. 2736). It is this letter which is the subject of this petition.

The fact that a defendant's affirmative request for counsel is pivotal to this issue is further exemplified by this Honorable Court's ruling in *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988). In that case, the court determined whether the interrogation of the defendant after his indictment violated his Sixth Amendment right to counsel. In doing so, this Court noted that there was no doubt that defendant had the right to assistance of counsel at his post-indictment interviews under the Sixth Amendment. The Court noted, in footnote 3 of its ruling, that defendant "had not retained or accepted by appointment" a lawyer to represent him at the time of the questioning. *See Patterson v. Illinois, supra* at p. 290. The court specifically noted that the defendant in that case at no time sought to exercise his right to have counsel present and stated as follows:

> The fact that petitioner's Sixth Amendment right came into existence with his indictment, *i.e.*, that he had such a right at the time of his questioning, does not distinguish him from the preindictment interrogatee whose right to counsel is in existence and available for his exercise while he is questioned. Had petitioner indicated he wanted the assistance of counsel, the authorities' interview with him would have been stopped and further questioning would have been forbidden (unless petitioner called for such a meeting). This was our holding in *Michigan v. Jackson, supra* which applied *Edwards* to the Sixth Amendment context. We observed that the analysis in *Jackson* is rendered wholly unnecessary if petitioner's position is correct: under petitioner's theory, the

> officers in *Jackson* would have been completely barred from approaching the accused in that case unless he called for them. Our decision in *Jackson,* however, turned on the fact that the accused "ha[d] asked for the help of a lawyer" in dealing with the police. [*Citations omitted.*] *Patterson v. Illinois, supra* at pp. 290-291.

In rejecting Montejo's alleged Sixth Amendment violation claim, the Louisiana Supreme Court relied upon a decision issued by the United States Fifth Circuit of Appeals in *Montoya v. Collins*, 955 F.2d 279 (5th Cir. 1992), *cert. denied* 506 U.S. 1036, 113 S.Ct. 820, 121 L.Ed.2d 692 (1992). The facts of that case with respect to the Sixth Amendment issues were very similar to the facts currently before this Honorable Court. In *Montoya, supra,* the defendant was taken before a magistrate, and the court noted that his Sixth Amendment rights attached at that time. It was undisputed that during Montoya's appearance before the magistrate, the magistrate appointed counsel to represent Montoya. The Fifth Circuit noted that the Texas state courts found, based upon the record, that Montoya did not request counsel, but the magistrate appointed counsel. The court further noted that at no time did Montoya make a statement or affirmation requesting counsel or accepting counsel. The court found that he "did nothing at all" when the magistrate appointed counsel for him. *See Montoya, supra* at p. 282. The same is true herein. Montejo's Sixth Amendment rights attached at the time of the 72 hour hearing. The minute entry reflects that bond was denied and the Indigent Defender Board was appointed to represent the defendant, but there was no statement, request or other affirmation made by Montejo at that time to reflect his request for or acceptance of such counsel. The Louisiana Supreme Court held that something more than "mute acquiescence" in the appointment of counsel is necessary to trigger the enhanced protection provided by *Michigan v. Jackson, supra*. (Pet. App., p. 47a).

In *Montoya, supra*, the Fifth Circuit noted that, although Montoya's Sixth Amendment rights attached when he was brought before the magistrate, "standing alone however the mere *attachment* of a defendant's Sixth Amendment rights does not bar police from attempting to interrogate him". *Montoya, supra* at p. 282, *citing Patterson v. Illinois, supra.*

In holding that Montoya did not assert his right to counsel within the meaning of *Michigan v. Jackson, supra*, the Fifth Circuit reasoned as follows:

> The rule of *Jackson* is invoked by the defendant's 'assertion. . . of the right to counsel'. This language connotes an actual, positive statement or affirmation of the right to counsel. At no time did Montoya make such a statement or affirmation-as the state court found, he did not request counsel, and he said nothing at all when the magistrate appointed counsel for him . . . Rather, Montoya never asserted, or invoked, his right to counsel in the first place . . . For purposes of *Jackson,* an 'assertion' means

> some kind of positive statement or other action that informs a reasonable person of the defendant's 'desire to deal with the police only through counsel'. . . This holding does not require a defendant to utter the magic words 'I want a lawyer,' in order to assert his right to counsel . . . But interpretation, whether broad or narrow, is only required when there is a 'request' or an 'assertion' in the first place. [*Footnotes omitted.*] [*Citations omitted.*] *Montoya, supra* at p. 282-283.

The Fifth Circuit found that the argument set forth by Montoya would extend the prophylactic rule of *Michigan v. Jackson, supra,* to situations where the magistrate tells the defendant that he is appointing counsel for the defendant, and the defendant does not reject the appointment, but also does not seek to consult with counsel. The court cited this Honorable Court's decision in *Patterson v. Illinois, supra,* stating that in that case, although the defendant had the right to have the assistance of counsel at his post-indictment interviews, *Michigan v. Jackson* did not apply because the defendant "at no time sought to exercise his right to have counsel present". *Montoya, supra* at p. 283, *citing Patterson v. Illinois, supra* at p. 290. The Fifth Circuit further noted footnote 3 in *Patterson v. Illinois, supra,* recited hereinabove by the State, which references whether a defendant had retained or accepted by appointment a lawyer to represent him. The Fifth Circuit continued as follows:

> If the rule of *Jackson* is invoked by a defendant's 'indicating' his 'choice', then it makes little sense to apply the rule in this case, where Montoya indicated nothing, expressed no choices and made not the slightest response to the magistrate's intention to appoint a lawyer for him. *Montoya, supra* at p. 283.

The State submits the reasoning by the Fifth Circuit Court of Appeals is soundly based upon the precedent of this Honorable Court, and in fact, this Honorable Court denied certiorari in *Montoya, supra*. On the date in question, September 10, 2002, Montejo never requested nor did he accept by appointment counsel. When directly asked about counsel, he denied having counsel. He never sought to invoke his right to counsel, and therefore, the rule of *Michigan v. Jackson, supra*, was inapplicable.

The issue then becomes whether this defendant, Montejo, validly waived his right to counsel. The Louisiana Supreme Court found that there was no dispute that Montejo was given his *Miranda* warnings and that he signed a waiver of these rights prior to the September 10 excursion to look for the murder weapon, during which time he wrote the apology letter to Mrs. Ferrari. (Pet. App. 49a). In *Patterson v. Illinois, supra*, this Honorable Court noted that a waiver of the Sixth Amendment right to counsel is valid only when it reflects an intentional relinquishment or abandonment of a known right or privilege. In *Patterson, supra* at p. 293, this Court was convinced that by admonishing the defendant with *Miranda* warnings, the state had met its burden and that defendant's waiver of his right to counsel at the post indictment questioning was valid. This Court held that the *Miranda* warnings given to defendant made him aware of his right to have counsel present during the questioning and also served to make him aware of the consequences of a decision by him to waive his Sixth Amendment rights during post-indictment questioning. The Court specifically noted that the defendant therein knew that any statement he made could be used against him in subsequent criminal proceedings, noting that this is the ultimate adverse consequence a defendant could have suffered by virtue of his choice to make uncounseled admissions to the authorities. In holding that *Miranda* warnings and the waiver of his rights was sufficient to apprise him of the nature of his Sixth Amendment rights, this Honorable Court stated as follows in *Patterson v. Illinois*, *supra*:

> As a general matter, then, an accused who is admonished with the warnings prescribed by this Court in *Miranda* has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights so that his waiver on this basis will be considered a knowing and intelligent one ... Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer and that he was aware of the state's intention to use his statements to secure

a conviction, the analysis is complete and the waiver is valid as a matter of law. . .

* * *

. . . we have never suggested that one right is 'superior' or 'greater' than the other, nor is there any support in our cases for the notion that because a Sixth Amendment right may be involved, it is more difficult to waive than the Fifth Amendment counterpart.

* * *

Applying this approach, it is our view that whatever warnings suffice for *Miranda*'s purposes will also be sufficient in the context of postindictment questioning. The State's decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning or expand the limited purpose that an attorney serves when the accused is questioned by authorities. With respect to this inquiry, we do not discern a substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation and his value to an accused at post indictment questioning.

* * *

Thus, we require a more searching or formal inquiry before permitting an accused to waive his right to counsel at

> trial than we require for a Sixth Amendment waiver during postindictment questioning-*not* because postindictment questioning is 'less important' than a trial (the analysis that petitioner's 'hierarchical' approach would suggest)-but because the full 'dangers and disadvantages of self-representation' during questioning are less substantial and more obvious to an accused than they are at trial. Because the role of counsel at questioning is relatively simple and limited, we see no problem in having a waiver procedure at that stage which is likewise simple and limited. So long as the accused is made aware of the 'dangers and disadvantages of self-representation' during postindictment questioning, by use of the *Miranda* warnings, his waiver of his Sixth Amendment right to counsel at such questioning is 'knowing and intelligent'. [*Citations omitted.*] [*Footnotes omitted.*] *Patterson v. Illinois, supra* at pp. 298-300.

As stated hereinabove, there is no factual dispute that Montejo was given his *Miranda* rights and waived those rights prior to writing the letter at issue. Accordingly, the State submits his waiver was valid.

B. Harmless Error

As argued above, the State of Louisiana submits that the state court correctly allowed the introduction into evidence of the letter written by defendant, which he asserts herein was obtained in violation of his Sixth Amendment rights. However, the State submits that even if any error is found by this Honorable Court with the admission of such letter, any such error was harmless in light of the other overwhelming evidence of defendant's guilt at trial.

This Honorable Court has previously held that the admission of a confession alleged to have been obtained in violation of a defendant's rights is subject to harmless error analysis. *Milton v. Wainwright*, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972) and *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The only evidence at issue herein alleged to have been obtained in violation of defendant's Sixth Amendment right to counsel is the letter which he wrote to the victim's widow on September 10, 2002. The State submits that the verdict rendered herein was certainly not attributable to any error in the introduction of the letter at issue. The jury had before it approximately four hours of videotaped interviews with Montejo, conducted prior to this time, in which Montejo admitted that he shot Mr. Ferrari when he unexpectedly returned home and interrupted Montejo's burglary of the home. The videotaped confession is not at issue in this Petition, and the admission of such videotaped interviews with Montejo were upheld by the state district court and the Louisiana Supreme Court. Moreover, the uncontradicted testimony of the witnesses at trial placed Montejo at the scene of the crime at the approximate time of the murder, DNA evidence matching defendant was found under the fingernails of the victim, and photographs taken of defendant shortly after his arrest shows abrasions on his neck consistent with scratches. The Louisiana Supreme Court noted in its decision the testimony of Dr. Sinha, an expert in molecular biology and DNA analysis, who testified at the trial and "concluded that the victim intentionally scratched defendant because sample characteristics ruled out DNA transfer by coincidental contact". (Pet. App., p. 5a).

This Honorable Court need not reach the merits of Montejo's claims herein, because any error in allowing introduction of the letter at issue was harmless.

CONCLUSION

For the foregoing reasons, the State of Louisiana submits that the Petition for Writ of Certiorari filed by Jesse Montejo should be denied.

Respectfully submitted:

KATHRYN LANDRY
Counsel of Record
Special Appeals Counsel
for WALTER P. REED,
District Attorney
Post Office Box 82659
Baton Rouge, LA 70884
Telephone: (225) 766-0023

Counsel for Respondent, State of Louisiana

REPLY
BRIEF

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SUPREME COURT, U.S.

③

No. 07-1529

IN THE
Supreme Court of the United States

JESSE JAY MONTEJO
Petitioner,

v.

STATE OF LOUISIANA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

REPLY BRIEF

JELPI P. PICOU
G. BEN COHEN
THE CAPITAL APPEALS
PROJECT
636 Baronne Street
New Orleans, LA 70113

DONALD B. VERRILLI, JR.
Counsel of Record
MARIN K. LEVY
JENNER & BLOCK LLP
1099 New York Ave. N.W.
Suite 900
Washington, D.C. 20001
(202) 639-6000

Counsel for Petitioner

(0728) 11

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Jesse Jay Montejo hereby submits this reply in support of his petition for a writ of certiorari, filed June 5, 2008.

I. THE STATE DOES NOT EVEN ATTEMPT TO DENY THE EXISTENCE OF A CONFLICT WARRANTING REVIEW.

The State's brief in opposition does not even purport to address the existence of an enduring conflict among state courts of last resort with respect to whether appointment of counsel triggers the protections of the Sixth Amendment. As the petition explained, the Louisiana Supreme Court's decision squarely conflicts with the decisions of the state courts of last resort in Wisconsin, Arkansas, Texas and the District of Columbia — all of which have rejected the argument that a defendant must affirmatively act to "accept" counsel by appointment so as to bar subsequent state-initiated interrogation in the absence of counsel. The State simply ignores these conflicting authorities.

Instead, the State emphasizes that the Louisiana Supreme Court's decision in this case is consistent with the Fifth Circuit's decision in *Montoya v. Collins*, 955 F.2d 279 (5th Cir. 1992). But the fact that there are two decisions on Louisiana's side of the conflict rather than just one is a reason for granting review, not denying it. The Fifth Circuit's *Montoya* decision makes clear that the question presented is a recurring one, and that there is a high likelihood of continuing and persistent division in the lower courts. *See also Stokes v. Singletary*, 952 F.2d

1567 (11th Cir. 1992) (disagreeing with analysis set forth in *Montoya*).

Thus, unless review is granted and the conflict is resolved, a defendant's Sixth Amendment right to counsel will continue to mean something different in Louisiana (and in federal court in the Fifth Circuit) than it does in Wisconsin, Arizona, Texas and the District of Columbia.

II. THE RESULT BELOW IS NOT DICTATED BY *MICHIGAN V. JACKSON* AND *ILLINOIS V. PATTERSON.*

The State also asserts that review is unnecessary because this Court's prior decisions have already resolved the question presented in the petition. That is incorrect.

Neither *Michigan v. Jackson*, 475 U.S. 625 (1986), nor *Patterson v. Illinois*, 487 U.S. 285 (1988), comes close to dictating the result reached by the Louisiana Supreme Court in this case. Neither case presented the question of what – if anything – a defendant must do to trigger the protections of the Sixth Amendment when counsel has *already* been appointed. The State's suggestion that those cases control here is thus specious. For example, the State asserts that because the defendant in *Jackson* affirmatively requested the assistance of counsel, it follows that defendants who fail to do so forfeit any Sixth Amendment protection. Br. in Opp. at 11. As a logical matter, that is a non sequitur, and nothing in the Court's opinion implies that a defendant who has been appointed counsel would be denied the protections of the Sixth Amendment simply because the defendant had not affirmatively signaled "acceptance" of the appointment. The State similarly errs in describing *Patterson* as establishing a rule that a defendant must invariably act to "accept" appointment of counsel in order to trigger Sixth Amendment protection. The defendant in that case was unrepresented at the time of interrogation and neither sought nor had been appointed counsel. Indeed, far from supporting the Louisiana Supreme Court's decision in this case, the following statement in *Patterson* suggests the opposite:

> We note as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect.

Patterson, 487 U.S. at 290 n.3.

The Wisconsin Supreme Court in *State v. Dagnall*, 612 N.W.2d 680 (Wis. 2000), relied on this very language to conclude that a defendant "did not have to invoke his right because he already had counsel." *Id.* at 695. Similarly, the Arkansas Supreme Court stated in *Bradford v. State*, 927 S.W.2d 329 (Ark. 1996) that the natural extension of *Jackson* was to hold that once a defendant has been appointed counsel, a waiver of *Miranda* rights will not suffice to validate a subsequent confession. *Id.* at 334.

Nor has the State explained how its reading of *Jackson* and *Patterson* can be squared with this

Court's precedent regarding self-representation and waiver of the right to counsel. As the petition explained, before a defendant can appear *pro se*, the defendant must affirmatively waive his right to counsel; otherwise, the Court presumes that appointed counsel has been accepted. *See generally Faretta v. California*, 422 U.S. 806 (1975). Moreover, as the Court held in *Brewer v. Williams*, 430 U.S. 387, 404 (1977), the burden is on the "[s]tate to prove an intentional relinquishment or abandonment of a known right or privilege" and "courts indulge in every reasonable presumption against waiver." (internal quotation marks omitted).

Thus, far from dictating the result below, this Court's precedents are sharply at odds with that result.

III. THE QUESTION PRESENTED IS SQUARELY PRESENTED ON THIS RECORD.

The State also seeks to muddy the waters by asserting that there was no police-initiated interrogation after Petitioner Montejo was appointed counsel. Br. in Opp. at 11. It should suffice to note that the State never raised that argument before the Louisiana Supreme Court. In all events, the record evidence forecloses the argument.

This Court has held that once a defendant's Sixth Amendment right has attached, the protections of the Sixth Amendment apply when the government makes "efforts to elicit information from the accused, including interrogation." *Michigan v. Jackson*, 475 U.S. 625, 630 (1986); *see also Maine v. Moulton*, 474 U.S. 159 (1985); *United States v. Henry*, 447 U.S.

264 (1980); *Brewer v. Williams*, 430 U.S. 387 (1977); *Massiah v. United States*, 377 U.S. 201 (1964). It is undisputed that the detectives approached Montejo at the jail on September 10, 2002, and asked him to come with them to show them where he supposedly discarded the murder weapon. Montejo did not seek out the police and offer to show them where the weapon could be found. The officers' actions were obviously an attempt to elicit information from the accused. Moreover, the record does not remotely establish that Montejo first had the idea of writing a letter to the victim's spouse and that he asked for a pen and paper to do so. Thus, the State's attempt to now claim that the detectives never deliberately elicited information from Montejo lacks any basis.

IV. THE STATE'S HARMLESS ERROR ANALYSIS IS MISTAKEN, AND NOT A REASON TO DENY REVIEW.

The half-hearted harmless error argument set forth at the end of brief in opposition provides no basis for denying review. The Louisiana Supreme Court did not rule that the alleged Sixth Amendment error was harmless – even though that court routinely accompanies its ruling on the merits with harmless error analysis – doubtless because the contention is meritless.

Although the State does not even bother to identify the standard of review governing its harmless error claim, the *Chapman* standard governs. *See Chapman v. California*, 386 U.S. 18 (1967). Under *Chapman*, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24; *see also Fry v. Pliler*, 127 S. Ct. 2321, 2325 (2007); *Neder v. United States*, 527 U.S. 1, 15 (1999); *Sullivan v. Louisiana*, 508 U.S. 275, 278-79 (1993). The burden lies on the State to prove that the error was harmless. *See Sullivan*, 508 U.S. at 279; *Chapman*, 386 U.S. at 24.

Contrary to what Louisiana suggests, the question is not whether a reasonable jury presented with the case absent the constitutional error could have convicted a defendant. Rather, the State must prove beyond a reasonable doubt that the defendant's conviction rested in no way upon the error. "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan*, 508 U.S. at 279; *see also Chapman*, 386 U.S. at 23. Accordingly, Louisiana must show beyond a reasonable doubt that the prosecution's presentation of the letter and several references to that letter in its case played no role in the eventual guilty verdict against Montejo.

The State cannot meet that standard here. The prosecution relied directly on the letter at several critical moments in the trial. The prosecution discussed the letter in both its opening statement and closing arguments to the jury, going so far as to make the letter its lead point in rebuttal. R. 2264 (Trial Tr. March 5, 2005), R. 2859-60 (Trial Tr. March 9, 2005). In the midst of trial, the government sought to have the letter given to the jury to read and examine, and the trial court granted that request. R. 2819-20 (Trial Tr. March 8, 2005). Perhaps most importantly, the prosecution used the letter to impeach the testimony of Mary Malencon — the only witness called by Montejo's defense to testify directly on his behalf. R. 2818-19 (Trial Tr. March 8, 2005). The improperly obtained letter was hardly peripheral to the prosecution's case. Having made the letter a central focus of its presentation to the jury, the State cannot now reasonably claim that such use of the letter had, beyond a reasonable doubt, no effect on the outcome reached at Montejo's trial. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 296-300 (1991) (holding that admission of a confession obtained by violating defendant's Fifth Amendment rights was not harmless despite physical evidence from the scene, circumstantial evidence, and a second confession); *Satterwhite v. Texas*, 486 U.S. 249, 258-60 (1988) (holding in a capital murder case that admission at sentencing phase of psychiatrist's testimony as to future dangerousness was not harmless despite evidence of prior convictions, testimony from eight police officers as to defendant's reputation for violent crimes, and testimony that defendant had once shot his mother's husband during an argument).

In short, the introduction of the illegally-obtained letter cannot be considered harmless.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JELPI P. PICOU	DONALD B. VERRILLI, JR.
G. BEN COHEN	*Counsel of Record*
THE CAPITAL APPEALS PROJECT	MARIN K. LEVY
636 Baronne Street	JENNER & BLOCK LLP
New Orleans, LA 70113	1099 New York Ave. N.W.
	Suite 900
	Washington, D.C. 20001
	(202) 639-6000

Counsel for Petitioner

JOINT
APPENDIX

\\\ (5)

Supreme Court, U.S.
FILED
NOV 17 2008
OFFICE OF THE CLERK

No. 07-1529

IN THE
Supreme Court of the United States

JESSE JAY MONTEJO,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

JOINT APPENDIX

KATHRYN LANDRY
Counsel of Record
P.O. Box 82659
Baton Rouge, LA 70884-2659
(225) 766-0023

Counsel for Respondent

DONALD B. VERRILLI, JR.
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001
(202) 639-6000

JELPI P. PICOU
G. BEN COHEN
THE CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955

Counsel for Petitioner

PETITION FOR CERTIORARI FILED JUNE 5, 2008
CERTIORARI GRANTED OCTOBER 1, 2008

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NOTICE

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Twenty-Second Judicial District Court
Parish of St. Tammany
State of Louisiana

Docket #: 355706 File date: 10/24/2002

Judge: DONALD M. FENDLASON Division: H

Defendant: MONTEJO, JESSE JAY

Defense Attorney: PICOU, JR., JELPI P. and WILLIAMS, JR., JAMES C.

Indigent: Y

Prosecuting Attorney: GRACIANETTE , RONALD and GARDNER, SCOTT

Trial

Action Date	Action Description	Dispose Description
10/24/2002	Indictment Filed Grand Jury	Return
11/4/2002	Motions	Continued
11/6/2002	Felony Arraignment	Plead N/Guilty
1/22/2003	Motions	Continued

Action Date	Action Description	Dispose Description
6/30/2003	Felony Jury Trial	Trial Continued
8/18/2003	Motions	Continued
8/25/2003	Felony Jury Trial	Trial Continued
9/23/2003	Motions	Continued
10/13/2003	Felony Jury Trial	Trial Continued
10/31/2003	Motions	Continued
11/17/2003	Felony Jury Trial	Trial Continued
1/21/2004	Motions	
2/9/2004	Felony Jury Trial	Trial Continued
3/8/2004	Motions	Continued
3/22/2004	Felony Jury Trial	Trial Continued
4/20/2004	Motions	Continued
5/10/2004	Felony Jury Trial	Trial Continued
5/18/2004	Motions	Continued
6/1/2004	Motions	Heard

Action Date	Action Description	Dispose Description
6/21/2004	Felony Jury Trial	Trial Continued
8/10/2004	Motions	Passed
9/7/2004	Felony Jury Trial	Trial Continued
9/16/2004	Motions	Court Cancelled
10/11/2004	Felony Jury Trial	Trial Continued
11/9/2004	Motions	Continued
11/15/2004	Felony Jury Trial	Trial Continued
12/13/2004	Motions	Passed
1/3/2005	Felony Jury Trial	Trial Continued
2/14/2005	Motions	Heard
2/28/2005	Felony Jury Trial	Qualifying
3/1/2005	Felony Jury Trial	Pre-Qualifying Continued
3/2/2005	Felony Jury Trial	Pre-Qualifying Continued

Action Date	Action Description	Dispose Description
3/3/2005	Felony Jury Trial	Jury Selection Begun
3/4/2005	Felony Jury Trial	Jury Selected
3/5/2005	Felony Jury Trial	Trial Begun
3/6/2005	Felony Jury Trial	Trial Continued
3/7/2005	Felony Jury Trial	Trial Continued
3/8/2005	Felony Jury Trial	Trial Continued
3/9/2005	Felony Jury Trial	Found Guilty By Jury
3/10/2005	Penalty Phase	Death Penalty
5/13/2005	Felony Sentencing	Final

Docket Detail for 10/24/2002
Action Date: 10/24/2002 Action Time: 3:50 PM
Docket Desc INDICTMENT FILED
Dispose Date 10/24/2002
Dispose Desc GRAND JURY RETURN

Supreme Court of Louisiana.
STATE of Louisiana
v.
Jesse Jay MONTEJO.
No. 2006-KA-1807.

Judge: VICTORY, J.

Date	Description
Feb. 16, 2007	Montejo Opening Brief
May 17, 2007	State Response Brief
Aug. 13, 2007	Montejo Reply Brief
Nov. 27, 2007	Oral Argument
Jan. 16, 2008	Opinion
March 7, 2008	Rehearing Denied

22ND JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. TAMMANY

STATE OF LOUISIANA

DOCKET NO. 355706 DIVISION: "J"

STATE OF LOUISIANA

versus

JESSE JAY MONTEJO

FILED: September 23, 2003 /s/
DEPUTY CLERK

MOTION TO SUPPRESS INCULPATORY STATEMENTS

NOW INTO COURT, through undersigned counsel, comes defendant herein, JESSE J. MONTEJO, and avers the following:

Defendant moves to suppress for use as evidence all oral or written inculpatory statements obtained from defendant by all law enforcement officers or other agents of the State in the above-captioned and numbered cause.

All of said confessions and other inculpatory statements are inadmissible in evidence because they were not made by defendant to said law enforcement officers or anyone else freely and voluntarily, but were made under the influence of fear, duress, intimidation, menaces, threats, inducements, and promises, and/or without mover having been advised of his Constitutional rights to remain silent, right to counsel, etc.

Respectfully submitted,

/s/

WILLIAM R. ALFORD, Jr.
J. KEVIN McNARY
22nd J.D.C. Indigent Defender's Office
Capital Division
1123 S. Tyler Street
Covington, La. 70433
(985) 892-8743

ORDER

IT IS HEREBY ORDERED that the State of Louisiana show cause on the ____ day of ______________, 2003, at o'clock __.m., why the foregoing motion should not be granted.

Covington, Louisiana, this ____ day of __________, 2003.

JUDGE

TWENTY-SECOND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA

STATE OF LOUISIANA	DIVISION: "H"
VERSUS	NUMBER: 355706
JESSE JAY MONTEJO	

THE HONORABLE DONALD A. FENDLASON
JUDGE

A Transcript of the Proceedings

Taken in Open Court at Covington, Louisiana, on

April 20, 2004

MOTION TO SUPPRESS

APPEARANCES:

REPRESENTING THE STATE OF LOUISANA:
SCOTT GARDNER, ESQ.
And
RONNIE GRACIANETTE, ESQ.
Assistant District Attorneys

REPRESENTING THE DEFENDANT:
WILLIAM R. ALFORD, III, ESQ.
And
KEVIN MCNARY, ESQ.
Public Defender's Office

BY THE COURT:
We want to call the case and make our appearances.

BY MR. GRACIANETTE:
Number 355706, State of Louisiana versus Jessie Montejo, Ronnie Gracianette representing the State.

BY MR. GARDNER:
Scott Gardner on behalf of the State.

BY MR. MCNARY:
Kevin McNary, co-counsel with William R. Alford, Jr., for Jessie Montejo.

BY MR. ALFORD:
Who is present in open court, Your Honor.

BY THE COURT:
Very well.
What do we have before us today?

BY MR. GARDNER:
There have been discovery motions filed. We have answered that by copying our entire file, by continuing to copy documents as they come in, also providing for physical inspection of items that might exist, and I presume that our continuing promise to provide open file discovery would satisfy all discovery requests.

BY MR. MCNARY:
That's correct, Your Honor.

BY MR. ALFORD:

That's correct.

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BY THE COURT:
Very well. Let the record reflect discovery motions have been satisfied by the State's open file policy.
BY MR. GARDNER:
There was a pleading filed by Mr. Alford and Mr. McNary entitled Jackson demand for aggravating circumstances at both guilt and penalty phase. I am at this time filing our first answer, answering that motion with references to all the open file discovery that we provided which focuses on Mr. Montejo's previous arrest and conviction for a series of offenses. All I have at this time is an N.C.I.C. and I have a request to Sam Gebbia to get offense reports on those. Soon as I get those I can provide those which will provide more specifics with regard to the underlying offenses and will probably give me, as well as the Court, some guidance as to whether or not any of those offenses might be admissible in the guilt phase itself. So, now I am giving notice to use those items in the guilt phase but I will reserve that until I can take a look at the offense report and also provide copies to defense counsel.
BY THE COURT:

Very well.

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BY MR. GARDNER:
I think there are motions to suppress both evidence and statements that would lie. I know of no formal identification procedures that exist, and I don't know, Bill, Kevin, have either of you seen any identifications that exist?
BY MR. ALFORD:
No.
BY MR. GARDNER:
I don't think that any lie, therefore I would presume and I would hope to go forward with testimony on motions to suppress the statements, as well as evidence, and we are prepared to start calling witnesses at this time.
BY THE COURT:
All right. I think we are, too. Proceed.
BY MR. GARDNER:
We call Detective John Morse at this time.
BY THE COURT:
Do we have the witnesses sequestered in this matter?
BY MR. GARDNER:
They are outdoors and they are not coming in to hear anybody else's testimony.

BY MR. MCNARY:
In the interest of saving time are we going to proceed on the motion to suppress

statement and evidence at the same time? Is it the same officers?

BY MR. GARDNER:
That would be fine.

BY THE COURT:
I think that would be judicious and appropriate.

JOHN MORSE
AFTER HAVING BEEN DULY SWORN
WAS EXAMINED AND TESTIFIED
AS FOLLOWS:

DIRECT EXAMINATION

EXAMINATION BY MR. GARDNER:
Q. Would you state your full name?
A. John Reed Morse, III.
Q. Let me direct your attention to September 6, of 2002, were you employed with the Sheriff's office in St. Tammany Parish at that time?
A. Yes. I was.
Q. And were you called upon to investigate the death of Lewis Ferrara?
A. Yes. I was.
Q. Did you respond to the scene?

A. Yes. I did.
Q. Did you also become aware of certain descriptions of a vehicle that was used in the offense?
A. Yes.

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Q. Based upon that did you subsequently come in contact with Jessie Montejo?
A. Yes.
Q. Did that take place on or about September 6, of 2002?
A. That's correct.
Q. Where did you come in contact with Mr. Montejo?
A. At the Gretna Police Station.
Q. What took place during your initial conversations or your initial meeting with him at Gretna P.D.?
A. I advised him of his Miranda rights. He advised that he understood his rights, wished to waive them.
I informed him we were conducting an investigation into a homicide and wished to speak to him about some facts involved in that case.
Q. Did you question him at the Gretna Police Department?
A. No. I did not.
Q. Did you question him in route from Gretna

back to St. Tammany Sheriff's Office Criminal Enforcement Building?

A. No.

Q. Was that a conscious decision on your part not to discuss it until you were back at your office?

A. Yes.

Q. Now, once you were back at your office, did you and Detective Wade Major formally advise

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him of his rights a second time by use of a Miranda rights form?

A. That's correct.

Q. I will show you motion to suppress number one, and I will ask if you recognize this item and if so how.
Is M.T.S. - 1, a photo-copy of the original rights form used by you as well as Detective Major in formally advising him of his rights?

A. Yes. It is.

BY MR. GARDNER:

Offer, introduce and file into evidence M.T.S. - 1.

BY THE COURT:

Let it be received.

EXAMINATION RESUMED BY MR.

GARDNER:

Q. Would you please read for the record the rights that -- now, did you read this rights form or did Detective Major read this particular rights form?
A. Detective Major read the form.
Q. Were you present for that?
A. Yes. I was.
Q. Did he read from this form in it's entirety?
A. Yes. He did.
Q. Would you read into the record the rights that Detective Major advised the defendant that he had?
A. Yes. The form starts at the top by saying, Statement of Miranda rights.

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Number one says, you have the right to remain silent. Number two, says anything you say can and will be used against you in a court of law. Number three says, you have the right to talk to a lawyer and have him present with you while you're being questioned. Number four says, if you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish. Number five says, you can decide at any time to exercise these rights and not answer any questions or make any statements.

Beneath that it says, I understand these rights and there is a signature that the defendant affixed to this form.

Q. Did the defendant indicate that he understood his rights?

Yes. He did.

Q. And did he sign that form in your presence indicating that he did understand his rights?

A. Yes. He did.

Q. Did he appear to you to understand his rights?

A. Yes.

Q. Did he appear to you to be intoxicated to such an extent that he would not understand his Miranda warnings?

A. He did not.

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Q. Did he indicate that he had any mental illness, mental defect or any mental problem that he would not understand his Miranda rights?

A. No.

Q. Did you see any evidence that the defendant suffered any such mental defect such that he would not understand his Miranda

rights?
A. No.
Q. With regard to his signing this waiver of rights, again, did you observe Detective Major read that waiver in its entirety to the defendant?
A. Yes. I did,
Q. And did he express that he wanted to speak with you, wanted to cooperate with this investigation?
A. Yes.
Q. Did he in fact sign that waiver in your presence?
A. Yes. He did.
Q. Did he appear to understand what he was doing?
A. Yes.
Q. Did you or Detective Major threaten him in order to get him to sign the waiver?
A. No.
Q. Promise him anything of value?
A. No.
Q. Coerce him in any way?
A. No.

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Q. Or do anything in your own opinion to be improper in order to get him to sign that waiver and agree to speak to you?
A. No.

Q. Did he do so freely and voluntarily?
A. Yes.
Q. At any time during that event did he during the reading of that Miranda rights form -- and let me ask you this, the Miranda rights which were read off the form, are those the identical Miranda rights which you verbally advised the defendant of at the Gretna Police Department?
A. Yes.
Q. All right. Now, at any time during the taking of the first portion of the statement, that is following this approximately 4:38 P.M., you advised him of his rights, during that statement did he begin speaking to you?
A. Yes.
Q. And did he speak to you freely and voluntarily?
A. He did.
Q. Did he continue speaking to you for a significant period of time leading up all most to 10:00 P.M.?
A. Yes.
Q. All right. At some point during that conversation, did he then indicate to you that he wished to speak with an attorney?
A. He did.
Q. And what did you do at that point?

A. I stopped -- myself and Detective Major stopped the interview.

Q. What took place during the next few minutes in terms of his conversations with you when you said we are stopping this interview?

A. He said that he changed his mind, he wished to speak to us again to further clarify some things, and he had some additional things he would like to say.

Q. Okay. Explain as best you can in your own words to the Judge exactly what took place after he said he wanted a lawyer?

A. He had asked for an attorney and we said okay, that's not a problem. We terminated the interview. We were walking out of the interview room. He said well, what is going to happen now? Basically, we said, well, you're going to be arrested. He said wait, I have some other stuff I want to talk to you about. I told him, I said, well, you have asked for an attorney. We cannot continue this interview with you. He said please, I really got a lot more stuff. He said I don't want it to look bad for me. I want to talk to you some more. I said, Jessie, I can't talk to you any more. This went on a couple of times. I said I cannot talk to you any more. You have asked for a lawyer. You have to have one present now before I can ask you any further questions. He basically begged us to reinterview him. At that point I said,

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well, we have some things we are going to have to clarify before we can proceed and we did so.

Q. All right. And based upon that, did you then prepare a second Miranda rights warning form to re-advise him of his Miranda warnings?

A. Yes.

Q. Who initiated the second portion of the statement, that is, after he said I want a lawyer, who was it that initiated this second statement that begins after 10:02 P.M.?

A. The defendant did.

Q. I show you State M.T.S. number two, ask if you recognize this item and if so how?

A. Yes. I do recognize this.

Q. Is that a photo-copy of the Miranda rights warning which took place at 10:02 P.M. after the defendant indicated he wanted to continue questions?

A. Yes.

BY MR. GARDNER:

Offer, introduce and file into evidence M.T.S. number two.

EXAMINATION RESUMED BY MR. GARDNER:

Q. Would you please read for the record the rights that you advised the defendant he had from M.T.S. number two?

A. Again, as the previous form, it starts with statement of Miranda rights. It says, you

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have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk with a lawyer and have him present with you while being questioned. If you cannot afford to hire a lawyer, one would by appointed to represent you before any questioning if you wish. You can decide at any time to exercise these right, and not answer any questions or make any statements. Beneath that it says, I understand these rights and there is also a section below that where the defendant affixed his signature indicating he understood his rights.

Q Did he appear to you to understand those rights this third time that you advised him of them?

A. Yes.

Q Did he appear to you to be intoxicated, impaired, mentally deficient or for any reason he would not understand his rights this third time you advised him of them?

A. No.

Q. Did you threaten him, coerce him, promise him, induce him or do anything improper in order to get him to sign this waiver and now agree to speak with you a third time?

A. No.

Q. Did he do so freely and voluntarily?

A. Yes.

Q. Did he want to do this?

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Yes.

Q. And that was the reason why you changed your mind and allowed the questioning to continue?

A. Yes. See, it was our intention to cease the interview at the point he had requested an attorney. We decided to continue after he basically, like I said, begged us to continue the interview because he said he had some additional things he wanted to say.

Q. Did you continue the interview from that point, at 10:02 P.M. and continue speaking with him over the period of time that followed that?

A. Yes.

Q. At any time during that period of time did he

request to stop the questioning?
A. No.
Q. At any time after 10:02 P.M. did he request to have an attorney present?
A. Not in that interview.
Q. Okay. And do you see Jessie Montejo in the courtroom today?
A. Yes. He is the defendant.
Q. Would you please point him out, tell us what he is wearing?
A. Yes. He is wearing a red and white striped shirt, he has dark-colored hair and a goatee.

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BY MR. GARDNER:
Let the record reflect the witness identified the defendant before the bar.

EXAMINATION RESUMED BY MR. GARDNER:
Q. Now, did you also participate in directing that search warrants be prepared and executed during the course of the investigation?
A. Yes.
Q. Let me turn your attention to the preparation

of warrants for a St. Mary Street residence. St. Mary, 2700 Mary Street, apartment number 28, who were the residents of that apartment?

A. It was the defendant and his live-in girlfriend. I believe her name was Bridgette Guy.

Q. A Desoto Street address, who were the occupants or why was that a focus for a search warrant?

A. It is the defendant's parents residence as well as that of his younger step-brother.

Q. Did you prepare or direct that a search warrant be prepared for the person of Jessie Montejo?

A. Yes.

Q. For what purpose was that?

A. To obtain any trace evidence, blood, hair, saliva, etcetera, clothing, photographs.

Q. Likewise, was a warrant prepared for the person of a co-perpetrator who was also arrested in this investigation, Jerry Moore?

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Yes.

Q. For what purpose?

A. The same.

Q. And a third co-perpetrator arrested inside this investigation, Eric Guy, was a search warrant prepared for his person?

A. Yes.

Q. Was there also a seizure of a van that is a van that was described in the event, as well as described by Jessie Montejo, as being used in the event?

A. Yes.

Q. Did you supervise or participate in the preparation of affidavit for search warrant for that Chevrolet Astro van?

A. Yes.

Q. Was there one warrant or two warrants prepared for that van?

A. I believe that there were two.

Q. One for the seizure of the van in Jefferson Parish?

A. Correct.

Q. One for the search of the van when brought back to St. Tammany Parish?

A. That's correct.

Q. And finally, was there a search warrant for a residence in Jefferson Parish prepared by members of the Jefferson Parish Sheriff's office as well as the St. Tammany Sheriff's office?

A. Yes, but I believe it was the Gretna Police Department.

Q. Gretna Police Department. I will show you M.T.S. number three which purports to be copies of the warrants as well as underlying affidavits. I have tabbed each one so you might look at the cover page and make sure that you have each of the residences, the persons as well as the Chevrolet Astro van. Are those the search warrants which I have referred to in questioning of you?

A. Yes.

BY MR. GARDNER:

Offer, introduce and file into evidence M.T.S. three, the search warrants in this case.

BY MR. MCNARY:

No objection, Your Honor.

BY MR. GARDNER:

Tender.

BY THE COURT:

Let them be received.

CROSS-EXAMINATION

EXAMINATION BY MR. ALFORD:

Q. Officer, my name is William Alford. I represent Mr. Montejo, and whenever during your testimony, I couldn't help but notice that you started -- you informed Mr. Montejo at 3:38 of his rights, you then questioned him over five hours, and he asked for a lawyer. Five-and-a-half

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hours, you make it sound like it was something that just happened very quickly because you didn't advise him of his rights again until five-and-a-half hours later. Do you have an explanation for that?

BY MR. GARDNER:
I do want to lodge an objection. It is a compound question. It asks for this officer to agree that he initially advised the defendant at 3:38 when he initially advised at 4:38 from the form.

BY MR. ALFORD:
What did I say? 3:38, I'm sorry. I meant 4:38. If I confused you, I'm sorry.

EXAMINATION RESUMED BY MR. ALFORD:

Q. You testified you advised him of his rights at 4:38?

A. That's correct.

Q. At St. Tammany --

A. Detective Major completed a form prior to 4:38 and advised him of his rights verbally at the Gretna Police station.

Q. Okay. According to your report there is only one paragraph that provides any

information about the next five-and-a-half hours. Are you familiar with your report?
A. Yes, sir. I am.
Q. Are you aware that I am telling the truth, there is only one paragraph in there that

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refers to what must have been five-and-a-half hours of interrogation?
A. Yes, sir.
Q. And because you don't advise him of his rights again until 10:02, correct?
A. That's correct.
Q. And you say that according to your report that he denied any involvement in the offense and that he asked for an attorney.
A. He admitted to a certain level of involvement prior to asking for an attorney.
Q. All right. But then he asked for an attorney?
A. Eventually, he did.
Q. Now, how did you talk him out of the attorney, wanting an attorney?
A. I didn't talk him out of it, sir.
Q. Officer, as a matter of fact, didn't you explain in detail the difference between manslaughter and murder to him?
A. I did not.

Q. Did anyone in your presence do that?

A. It's possible.

Q. And explained it would go easier on him if he would go ahead and cooperate with you and it might make the difference between those two different charges?

A. I don't remember it being explained that way.

Q. Well, how do you remember it being explained?

A. I don't recall anyone specifically explaining those differences to him. It is possible that that occurred, but I do not specifically recall that.

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Q. You're saying you did not do that?

A. Correct.

Q. All right. Who else would have been there that could have done that?

A. Detective Wade Major.

Q. Detective Major?

A. Yes.

Q. Detective who?

A. Wade Major. He was present with me for that interview.

Q. For that five-and-a-half hours?

A. For the time Mr. Montejo was initially interviewed that evening.

Q. Which you will agree was five-and-a-half hours?

A. That's likely.

Q. And anybody else present?

A. In the interview room itself.

Q. Yeah. That could have made those statements to him, explained to him the difference between manslaughter and murder?

A. At that time I don't believe.

Q. Okay. And you're saying you didn't but -- and you don't remember if anybody else did explain the difference?

A. That's correct.

Q. All right. As a matter of fact, wasn't he told that it would go easier on his little brother if he would give a statement?

A. I don't recall speaking about his little rother at that point.

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Q. You don't think you talked to him, or did you hear anybody else talk to him about his little brother?

A. At that point, sir, I don't recall discussing his little brother with him.

Q. Well, I find it difficult to understand why a man would say I want a lawyer and then you be able to come in here under oath and suggest to this Court that he begged you to let him give up his right to a lawyer.

Q. BY MR. GARDNER:

Objection. Argumentative.

EXAMINATION RESUMED BY MR. ALFORD:

Q. Explain that if you can?

BY MR. GARDNER:

Objection.

BY THE COURT:

I am going to allow him to explain the question. Overrule the objection to that extent. Granted the question was Somewhat argumentative but yet this witness is on cross-examination. I am going to allow the question to be asked. Do you understand the question?

BY DETECTIVE MORSE:

Vaguely, sir.

BY THE COURT:

Could you rephrase.

BY MR. ALFORD:

I will restate it.

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EXAMINATION RESUMED BY MR. ALFORD:

Q. You're telling this Judge that a man exercises his right to an attorney?

A. Yes, sir.
Q. And requests an attorney?
A. Yes, sir.
Q. Then proceeds to beg you to let him continue giving a statement; is that your testimony?
A. Yes, sir. It is.
Q. That is?
A. Yes.
Q. You're telling us that that begging was in no way precipitated by promises of leniency or by descriptions of different crimes that he might be charged with?
A. That's correct.
Q. We know of course, that you had recording capability, right?
A. Yes, sir.
Q. Was any of this begging on the part of the defendant recorded?
A. I believe a portion of it was.
Q. Okay. And where would we find that? Was it transcribed?
A. I do not recall whether it was transcribed or not, sir. There is a video tape which also has audio.
Q. There is a video tape and audio tape?
A. The video tape contains audio.
Q. Okay. Of the whole five-and-a-half hours?

A. No, sir. I don't believe it is from the initial point.

Q. Do we have the tapes in the courtroom?

BY MR. GARDNER:

We have given copies of every tape known to exist to defense. There were a series of tape recordings taken of multiple arrestees, but I am relatively sure that you have all of the video of your client that I know to exist.

BY MR. ALFORD:

Okay, well let me ask you the question again.

EXAMINATION RESUMED BY MR. ALFORD:

Q. Is it on tape, based on your memory, that Mr. Montejo asks for an attorney?

A. Yes, sir. I believe it is.

Q. All right. Is it on the tape that he begged you to allow him to continue answering questions?

A. I believe a portion of it is.

Q. All right. Now, how would that tape be marked so that -- would it be marked -- I guess that would be the first video, audio tape?

A. I would assume it would be, sir. I don't know what you're asking me as to how it would

be marked. It was entered into evidence
if that's what you're asking.
Q. Yes, sir. And who was in charge of the videoing or the audio recording?
A. Either Captain David Hall or Major Fred Oswald.

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Q. And so, there should be, according to your testimony, a tape that covers the entire five-and-a-half hours?
A. No, sir.
Q. How much will it cover, if you know?
A. I don't recall.
Q. You don't know. Okay?
A. I was not sure at the time of when the tape was even turned on.
Q. Okay. And I guess you would not have been aware of when it was turned off?
A. That's correct, not at the time.

(Off record discussion)

BY THE COURT:
Back on the record.

EXAMINATION RESUMED BY MR. ALFORD:
Q. Okay. So, you were not in charge of the audio or video?

A. No, sir.
Q. And give me those two names again, please, sir? I'm sorry, I didn't write them down?
A. Yes, sir. Captain David Hall and Major Fred Oswald.
Q. Did Mr. Montejo know he was being recorded?
A. At that time I don't believe he did.
Q. Okay. Were you in a room that was wired?
A. Yes.
Q. And was there one of those windows, a one-way window, mirror?

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A. No, sir.
Q. How would it have been video recorded without the camera in there?
A. The camera is --
Q. It is concealed some place in the room?
A. Yes, sir.
Q. All right. According to your report, Detective Morse, at 10:02 or you refer to it as 22:02 hours, you once again advised him of his rights, and he began talking, and how long did that interview last?
A. I don't recall.
Q. Well was it another five-and-a-half hours or

fifteen (15) minutes?

A. I don't believe it was another five-and-a-half hours.

Q. Would those have all been video taped?

A. Yes, sir. That would have been video taped in it's entirety.

Q. In its entirety?

A. Yes, sir.

Q. So, ever how long the video tape is, is it your testimony that's how long he was interrogated?

A. In that portion.

Q. From 22:02 until, and you don't now what the until is?

A. Correct.

Q. Do you recall when you first saw Mr. Montejo in Gretna, isn't it a fact that he told you there that he didn't want to go with you and he wanted a lawyer?

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A. No, sir. It is inaccurate.

Q. He did not tell you that in Gretna?

A. He did not.

Q. Who else was with you?

A. Myself, Detective Major, Detective Dana Parker from the Gretna Police Department was present. I believe that was it in that room at the time.

Q. So, your testimony is in your presence he did not say he wanted a lawyer while in Gretna?

A. No, sir.

Q. And he did not tell you that he wanted to go?

A. He said he was willing to come with us, he wanted to cooperate with our investigation. He did however say that he was not involved in it at that time.

Q. Did you advise him of his Miranda rights in Gretna?

A. Yes, sir. Verbally.

Q. Verbally. You didn't do a rights form?

A. No, sir.

Q. Gretna didn't do one to your knowledge?

A. I don't know whether Gretna did or did not.

Q. I understand. Okay. Now, were you involved in all of the search warrants?

A. To an extent, yes. I was not necessarily present at the scene for all of them.

Q. Okay. We have the warrants, Officer, but we don't have any returns on the warrants that we know of. Did you seize any items, or were items seized as result of these warrants?

A. Yes, sir. There are returns, sir.

Q. I'm not disputing that. We just don't have them. Well, we have a return from the van. We have a return from his body. That's where you took saliva and all that. Desoto Street. Who lived on Desoto Street?

A. His parents and his brother and I believe he used that address as well from time to time.

Q. Okay. We have three of the returns.

BY MR. GARDNER:

Judge, I know some of the searches did not result in any items being seized, but I will be happy to go through each of the returns and make sure that defense has returns on all of them.

BY MR. ALFORD:

Okay.

EXAMINATION RESUMED BY MR. ALFORD:

Q. But you know, of course, if anything was seized returns were made?

A. Yes, sir. And we would have made a return as well even if nothing was seized to inform the Judge nothing in fact was seized.

Q. To your recollection, were there instances where nothing was seized?

A. I will have to refer back to my notes, to my report.

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BY MR. ALFORD:

No further questions, Your Honor. Thank you.

BY THE COURT:

Any re-direct?

BY MR. GARDNER:

Yes.

RE-DIRECT EXAMINATION

EXAMINATION BY MR. GARDNER:

Q. With regard to the period of time that you were speaking with Jessie Montejo, were there provision made for him to have rest periods?

A. Yes.

Q. For him to have food?

A. Yes.

Q. Drinks?

A. Yes.

Q. Cigarettes?

A. Yes.

Q. And did you likewise even go so far as to get a heater for him when he indicated that he was cold?

A. Yes.

Q. At any time during any of your conversations with him did you threaten him in any way in order to get him to speak with you or to continue speaking with you?

A. No.

Q. Did he do so freely and voluntarily?

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A. Yes. He did.

BY MR. GARDNER:

Nothing further of this witness.

BY THE COURT:

Officer, you may step down. Wait outside.

BY MR. ALFORD:

Your Honor, could we approach the bench?

A. BY THE COURT:

Yes.

(Bench conference held)

BY THE COURT:

Call your next witness.

BY MR. GARDNER:

Call Detective Major.

DETECTIVE WADE MAJOR
AFTER HAVING BEEN DULY SWORN
WAS EXAMINED AND TESTIFIED

AS FOLLOWS:

DIRECT EXAMINATION

EXAMINATION BY MR. GARDNER:

Q. Would you state your full name for the record?

A. Willis Wade Major.

Q. How are you employed?

A. I am a Detective with the Mandeville Police Department.

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Q. Let me direct your attention to September of 2002, at that time were you employed by the Sheriff's Office in St. Tammany Parish?

A. Yes, sir, as a Detective.

Q. Specifically on September 6, were you asked to assist in an investigation into the murder of Lewis Farrara?

A. Yes, I was.

Q. Did you participate in meeting with Jessie Montejo as a result of that investigation?

A. Yes, sir.I did.

Q. Do you see Mr. Montejo in the courtroom and if so, would you identify him?

A. Yes, sir. He's the gentleman sitting at the end of the table in the red and white stripes.

Q. BY MR. GARDNER:
Let the record reflect the witness identified the defendant before the bar.

EXAMINATION RESUMED BY MR. GARDNER:

Q. Where did you initially come into contact with the defendant?

A. At Gretna Police Department.

Q. Did you participate in questioning him at the Gretna Police Department or in transit between Gretna and over to the Slidell Enforcement Complex?

A. No, sir.

Q. Was that a conscious decision on the part of you as well as Detective John Morse?

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A. Yes, sir. It was.

Q. While back at the enforcement complex did you personally advise the defendant of his rights with a Miranda rights form?

A. Yes, sir. I did.

Q. I will show you M.T.S. one, ask if you recognize this and if so how? Is that a photo-copy of the rights form which you used to explain to the defendant his rights?

A. Yes, sir. It is.
Q. Did you read it in its entirety?
A. Yes. I did.
Q. Did he indicate he understood his rights?
A. Yes, sir. He did.
Q. Did he in fact sign indicating he understood his rights?
A. Yes, sir.
Q. Did you likewise read the second portion which is a waiver?
A. Yes, sir.
Q. Did he indicate he understood and wished to waive his Miranda rights and speak with you?
A. Yes, sir. He did.
Q. Did he sign and did you sign attesting to that fact?
A. Yes, sir. We both did.
Q. At any time -- now did he indicate that he understood all those rights?
A. Yes, sir.

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Q. Did he appear to you to understand all those rights?
A. Yes, sir. He did.
Q. Did he appear to you to be intoxicated such

that he would not understand his rights?

A. No, sir.

Q. Mentally deficient, mentally challenged, mentally ill or for any reason you observed would not understand his rights?

A. No, sir.

Q. Indicated that he did and appeared to understand his rights?

A. Yes, sir.

Q. Did you speak with him from the period of time after 4:38 P.M. until some point in the interview in which he indicated he would rather have an attorney present?

A. Yes, sir.

Q. What took place when the defendant indicated he wanted to have an attorney present?

A. Detective Morse and I were in the interview room with him. We immediately stopped the interview, got up to leave. He indicated no, he wants to talk to us. We told him no, we can't. We're sorry. He practically begged for us to come back in and resume talking to him. At which time we did, after doing a second rights form.

Q. All right. I show you M.T.S. two, ask if you recognize this second rights form executed by Detective John Morse at approximately 10:02 P.M. Do you recognize M.T.S. two?

A. Yes, sir.

Q. Is that a photo-copy of the second rights form indicated after the defendant wanted to resume questioning?

A. Yes, sir.

Q. Was this form read to him in its entirety?

A. By Detective Morse.

Q. Did he indicate he understood his rights?

A. Yes, sir.

Q. Did you watch him sign both the understanding of the right as well as the waiver portion?

A. Yes, sir. I did.

Q. Did you threaten him or promise him in any way in order to get him to sign this second statement indicating that he wished to speak with you?

A. No, sir.

Q. Did he do so freely and voluntarily?

A. Yes, sir.

Q. Did he want to cooperate?

A. He did.

Q. Did he want to tell you a new version of the events?

A. Yes, sir.

Q. Did he do so?

A. Yes, sir.

Q. Is it your perception that portions of the first statement, prior to him asking for his lawyer, that portions of that were in fact video taped by people who were outside of the room?

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A. Yes, sir.
Q. And is it also your perception that much, if not all of the second portion of the interview, after 10:02 P.M., was in fact video taped?
A. Yes, sir.
Q. At any time after 10:02 P.M. while the defendant was speaking to you, did he indicate that he wished to stop questioning?
A. No, sir.
Q. At any time after 10:02 P.M. did he indicate he wanted to have a lawyer present?
A. No, sir.
Q. All right. Did he speak with you freely and voluntarily during that second portion of the interview?
A. Yes, sir.
Q. Now, in the afternoon hours, excuse me, in the early morning hours of September 7th, of 2002, did you likewise participate in speaking with Jessie Montejo in the presence of Detective Jerry Hall?
A. Yes, sir. I did.
Q. And at the beginning of that interview did you,

as well as Detective Hall, participate in re-advising him of his Miranda rights?
A. Yes, sir. Detective Hall did.
Q. I will show you M.T.S. four, I will ask if you recognize this item and if so how?
A. Yes, sir. I do.

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Q. Is that a photo-copy of the rights form which Detective Hall, in your presence, used to advise the defendant of his rights?
A. Yes, sir. It is.
Q. Did Detective Hall read this item in its entirety?
A. Yes. He did.
Q. Did the defendant sign indicating he understood his rights?
A. Yes, sir. He did.
Q. Did he likewise sign indicating he wanted to waive his rights?
A. Yes, sir.
Q. Was that after Detective Hall read to him the entirety of the waiver of rights portion?
A. Yes, sir. It was.
Q. Did the defendant affix his signature both to understanding as well as waiving his

rights?
A. Yes, sir. He did.
Q. Did Detective Hall affix his signature as well as the date and time indicating he was witnessing that waiver of rights?
A. Yes, sir.
Q. At any time during the 3:45 statement, did the defendant indicate he wished to cease questioning?
A. No, sir. Didn't.
Q. At any time during the 3:45 statement did the defendant indicate he wished to have an attorney present?
A. No, sir. He didn't.

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Q. Did you do anything to threaten or coerce him in order to get him to speak with you during the 3:45 statement?
A. No, sir.
Q. Or promise him anything of value, any inducements or anything improper in order to get him to speak to you?
A. No, sir.
Q. Did he want to do so?
A. He did.
Q. Did he cooperate fully because he wanted to?
A. Yes, sir.

Q. BY MR. GARDNER:

Offer, introduce and file into evidence M.T.S. four.

Q. BY THE COURT:

Let it be received

EXAMINATION RESUMED BY MR. GARDNER:

Q. Following the 3:45 conversation, did the defendant at some point in the evening hours indicate that he would assist you in finding where the gun that he used to kill Mr. Farrara was?

A. Yes, sir. He did.

Q. And as a result of that, tell me what took place?

A. Detective Bobby Juge and myself went and got Mr. Montejo out of the parish jail, transported him to the Highway 11 bridge where we spray-painted a marking on the

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bridge where Mr. Montejo had said he was near when he threw the gun into the lake.

Q. During those conversations, did he do that freely and voluntarily?

A. Yes, sir. He did.

Q. Did he seem to want to show you where that gun was?

A. Yes, sir. He did.

Q. Did you threaten him in any way to get him to go out and show you where the gun was?

A. No, sir. He indicated that he wanted it to be proven that the gun was actually Mr. Farrara' s, he didn't bring it into the house to commit the homicide.

Q. Was that his stated purpose in asking to go out to show you where that gun could be found?

A. Yes, sir.

Q. After the September 7th evening trip to U.S. 11, to mark the area for the dive team, did you have any further contact with Jessie Montejo?

A. No, sir.

Q. BY MR. GARDNER:

Tender.

CROSS-EXAMINATION

EXAMINATION BY MR. ALFORD:

Q. Officer, why would Mr. Montejo want to establish to you that he did not enter the house with a gun?

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BY MR. GARDNER:

Objection. Calls for speculation.

EXAMINATION RESUMED BY MR. ALFORD:

Q. If you know?

BY THE COURT:

I will allow him to answer if he knows the answer.

(Witness responds)

A. Mr. Montejo had indicated to us that he was just going there to do a burglary, not to commit a homicide and he says the gun was Mr. Farrara's, therefor he wanted to help us find the gun so that he could prove that.

Q. Well, as a matter of fact, that was the result of your trying to con him, wasn't it?

A. Absolutely not.

Q. Trying to tell him that if he didn't enter the house with a gun then it was just simple burglary?

A. I told him that it was a burglary, but because he had armed himself once in the house, it would have been an aggravated burglary.

Q. Did you explain -- after the first time Mr. Montejo said he wanted an attorney, did you explain to him during this five-and-a-half hour interval the difference between manslaughter and murder?

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BY MR. GARDNER:

Judge, I am going to lodge an objection to the form of the question, again, the five-and-a-half hour interval is the first statement. Then there is a request for an attorney. My understanding of the question, I was confused as to the time.

BY THE COURT:

Do you understand the question, sir?

BY DETECTIVE MAJOR:

If you could repeat it, sir?

EXAMINATION RESUMED BY MR. ALFORD:

Q. At 4:38, this is the first rights form, after he signed that, he is questioned for a bit, then he says he wants a lawyer?

A. Yes, sir.

Q. Right. Then after that, five-and-a-half hours later, apparently he has a change of heart because you have another rights form signed?

BY THE COURT:

That's a misstatement, I believe Mr. Alford, of the evidence. The first hour session, the first session took five-and-a-half hours that ended at 10:02.

BY MR. ALFORD:

That's correct.
BY THE COURT:
Then he said, I want a lawyer.

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BY MR. ALFORD:
That's correct.
BY THE COURT:
Then he said no, I am changing my mind. That's what the testimony reveals to the Court thus far. So, the first interview took five-and-a-half hours approximately starting about 4:38, terminating at 10:02. That's the time period you're talking about, Mr. Alford?
BY MR. ALFORD:
Yes, sir.
BY THE COURT:
You understand the time period?
BY DETECTIVE MAJOR:
Yes, sir.
BY THE COURT:
He understands.

EXAMINATION RESUMED BY MR. ALFORD:
Q. Now, before 10:02, he must have said he wanted a lawyer?
A. Maybe two or three minutes before that.
Q. Okay. So now, up until then had all of that

interview been recorded?

A. To my knowledge, yes, sir.

Q. And even until 10:02 was it recorded?

A. Yes, sir. It should be.

Q. So, on that interview we are going to have recorded evidence that he said he wanted a lawyer and that then he changed his mind

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and pleaded with you to let him continue talking?

A. Yes, sir.

Q. That will be on the tape?

A. Should be. Yes, sir.

Q. Is there anything that would be on the tape where you explained to him the difference between manslaughter and murder?

A. Probably.

Q. What was your purpose in explaining that?

A. Only purpose there was to try to get the truth from Mr. Montejo about what had occurred and his involvement.

Q. And isn't it a fact that you told him that by cooperating maybe the charge would be manslaughter rather than murder?

A. No, sir. I never told him that.

Q. What is the purpose of explaining the difference?

A. As I just said, to try to get the truth from him.

Q. How did -- explain to me your logic in how that tries to obtain truth?

A. When we, in the course of an interview, explain the different elements of the crime and what fits a particular crime, a lot of time a suspect will pick the lesser of two evils and start telling you more of what the truth is.

Q. Okay. So in other words, you were trying to get Montejo to give you facts that would indicate it was a manslaughter?

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A. No, sir. I was trying to get him to give me the truth.

Q. So, was he in any way promised anything if he would surrender his right to a lawyer and come back and sign his rights again?

A. No, sir.

Q. He was not?

A. No, sir.

Q. I am curious then, from 10:02 until three o'clock in the morning, apparently, three o'clock the next morning, I think 3:42, don't hold me to that date, at 3:42 you felt it necessary to do another rights form?

A. Yes, sir.

Q. Why did you feel it necessary to do another rights form? Did he once again ask for a lawyer?

A. No, sir. He didn't. He was not in our custody that entire time. After the 10:02 interview he was taken to the St. Tammany Parish jail where he was booked. Around 3:30, Detective Julie Hall and I went back to the jail, checked him out, brought him back to the Covington office for a third interview.

Q. Okay. So, you found it necessary to have him sign another rights form?

A. Yes, sir.

Q. Then at -- actually, according to the report, it is marked D-15, which had not been admitted here, but there was a rights form

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that was signed on 9-7, at seven minutes after midnight?

A. I don't think it was my rights form.

Q. well --

BY MR. ALFORD:

Do y'all have that?

A. BY MR. GARDNER:

May I approach the witness?

BY THE COURT:

Sure.

EXAMINATION RESUMED BY MR. ALFORD:

Q. Right here it says -- do you know anything about that rights form?

A. No, sir.

Q. The one you have testified to is the one that was at 3:45?

A. Yes, sir.

Q. So, according to this report any way apparently someone else administered a rights form at seven minutes after midnight on 9-7; is that correct?

A. Yes, sir.

Q. Do you know if that was because he had once again asked for a lawyer?

A. I don't think he ever asked for a lawyer after that first time in the first interview.

Q. Do you have any idea who might have given, executed another Miranda rights form at seven minutes after midnight?

A. No, sir. I don't. Only thing I could add to that is it is a good possibility that that

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was a rights form to go in at the booking process. That should have been about the time he was taken over to the parish jail.

Q. BY MR. ALFORD:

You don't have that?

A. BY MR. GARDNER:

I don't have it that I can lay my hands on.

BY MR. ALFORD:

Okay.

EXAMINATION RESUMED BY MR. ALFORD:

Q. So, from 4:38 until what time would your testimony be that Mr. Montejo was questioned?

A. About another hour, for about an hour from the start of that interview.

Q. No, on 9-6 at 4:38, the first rights form was --

A. Oh, in the afternoon. I apologize.

Q. The first rights form?

A. Well, until ten o'clock, roughly.

Q. Okay. Until ten o'clock and then he was continued, you did another rights form at 10:02 and how long did that interview take, if you recall?

A. I don't recall, sir.

Q. Okay. Do you know whether or not he asked for a lawyer while he was in Gretna?

A. He didn't ask us for an attorney.

Q. Not in your presence?

A. He did not ask me for an attorney in my presence. No, sir.

Q. Not on in your presence. Okay.

BY MR. ALFORD:

No further questions.

RE-DIRECT EXAMINATION

EXAMINATION BY MR. GARDNER:

Q. At any time while you were in Gretna, did anyone bring to your attention that Montejo had requested an attorney?

A. No, sir.

Q. Did anybody indicate to you during that period of time while you were in Gretna that y'all needed to get an attorney for him?

A. No, sir.

Q. At any time was that even an issue that the defendant had requested an attorney?

A. No, sir. He was advised of his Miranda rights verbally by Detective Morse and he did not request an attorney.

Q. Did he indicate that he wanted to come back to St. Tammany and cooperate in this investigation?

A. Yes, sir.

Q. During the period of time that followed, did you see to it he was provided with rest breaks, food, drinks, cigarettes, as well as a heater for his comfort?

A. Yes, sir. We did.

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Q. At any time during the periods of time you had contact with Montejo that you just described, did you threaten him in any way in order to get him to speak to you?
A. No, sir.
Q. Did he do so freely and voluntarily?
A. Yes, sir. He did.
BY MR. GARDNER:
Nothing further of this witness. Ask this witness be released.
BY THE COURT:
So ordered.
BY MR. GARDNER:
Call Detective Jerry Hall.

JERRY HALL
AFTER HAVING BEEN DULY SWORN
WAS EXAMINED AND TESTIFIED
AS FOLLOWS:

DIRECT EXAMINATION

EXAMINATION BY MR. GARDNER:
Q. Would you state your name for the record?
A. Jerry Hall.
Q. How are you employed?
A. St. Tammany Parish Sheriff's Office, Criminal

Investigations Division.

Q. Let me direct your attention to September of 2002, were you employed by the sheriff's office and in the investigations division at that time?

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A. Yes, sir. I was.

Q. Did you participate in an investigation into the murder of Lewis Farrara?

A. Yes, sir.

Q. During the period of time following that homicide, did you come in contact with Jessie Montejo?

A. I did, sir.

Q. Let me direct your attention specifically to September 7th at approximately 3:45 A.M., did you as well as Detective Major have contact with the defendant and speak with him?

A. Yes, sir. I did.

Q. All right. Did you advise him of his rights prior to speaking to him?

A. Yes, sir.

Q. I will show you M.T.S.-4, ask if you recognize this Miranda rights form and if so how? Is that a copy of the Miranda rights warning which you gave to the defendant at approximately 3:45 A.M. on September 7th?

A. Yes, sir. A stamped, file copy.

Q. All right. Did you read that form in its entirety to the defendant?

A. Yes. I did.

Q. Do you see Jessie Montejo in the courtroom today, and if so would you please identify him?

A. The gentleman seated next to Mr. Alford at counsel table.

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BY MR. GARDNER:

Let the record reflect the witness identified the defendant before the bar.

EXAMINATION RESUMED BY MR. GARDNER:

Q. Did you read the Miranda warning as well as waiver to the defendant?

A. I did.

Q. Did the defendant sign the Miranda warning indicating he understood his rights?

A. Yes, after he was physically given it and allowed to review it, as well as being read to him.

Q. Did he indicate to you that he understood those rights?

A. Yes. He did.

Q. Did he sign indicating he understood his rights?

A. Yes, sir.
Q. Did he appear to understand his rights?
A. Yes.
Q. Did he appear intoxicated, mentally challenged, mentally incapacitated or for any reason that he would not understand those rights?
A. Not that I know of. No, sir.
Q. Did he sign indicating he wished to waive his rights?
A. He did, sir.
Q. Did he appear to understand what he was doing at that time?
A. Yes, sir.
Q. Did he speak to you following that?

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A. Yes, sir. We had an interview with him. Yes, sir.
Q. Did you threaten him in order to get him to speak with you?
A. No, sir.
Q. Promise him anything?
A. No.
Q. Induce him in any way in order to get him to speak to you?
A. In no manner whatsoever.
Q. Did he speak to you freely and voluntarily?

A. Yes. He did.

Q. At any point in your conversation following the 3:45 Miranda warning, did the defendant indicate to you that he wished to stop questioning?

A. No, sir.

Q. At any time during the 3:45 statement did the defendant indicate to you he wished to have an attorney present?

A. No, sir.

Q. All right. Now, did you come back into contact with the defendant on September 9th, of 2002?

A. Yes, sir.

Q. For what purpose?

A. Part of a follow-up investigation, questioning.

Q. Did that include efforts to locate the gun as well as a money bag that had been seized during the robbery of the victim?

A. Yes, sir. That would have been part of what I call the follow-up investigation.

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Q. Directing your attention to September 9th of 2002 at approximately 8:45 A.M., did you again re-advize the defendant of his

Miranda warnings?

A. Yes, sir.

Q. I will show you M.T.S.-5, M.T.S.-6, M.T.S.-7 and M.T.S.-8 and ask if you recognize these Miranda warning forms? Referring to M.T.S.-5, do you recognize that item?

A. I do, sir.

Q. Is that a statement of Miranda warnings as well as waiver executed by the defendant in your presence about the date and time specified at the bottom of that form?

A. Yes, sir. It is.

Q. Did you read that warning to the defendant in its entirety?

A. I did, sir.

Q. Did he indicate he understood it, wished to waive his rights and speak to you?

A. Yes, sir.

Q. Turning to M.T.S.-6, is that another statement of Miranda rights, as well as waiver of rights form, that you advised the defendant he had?

A. Yes.

Q. And was that on the same date at noon?

A. Yes, sir.

Q. Did you date and time that Miranda warning?

A. I did, sir.

Q. Did you use this warning in reading to the defendant and making sure he understood his Miranda warnings?

A. Yes, sir. I did.

Q. Did he execute both the understanding of the rights as well as the waiver of rights in your presence?

A. Yes. He did.

Q. Did he appear to you to understand his rights at that time?

A. Yes, sir.

Q. All right. M.T.S.-7, is that again a statement of Miranda rights, a waiver of rights executed by the defendant on the same date at approximately 14:45, at 2:45 P.M.?

A. Yes, sir.

Q. These three contacts that you had with the defendant, were these lengthy contacts or lengthy interrogations?

A. No, sir. The first two were very brief in nature.

Q. What was the content or the reason you had contact with him during those first two?

A. What we were looking for was some follow-up information concerning location of the weapon that was allegedly discharged at a specific location.

Q. At that time had the dive team had any success in going to the location that Juge and Major had identified on the 7th, that is, had they found the gun at that location?

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A. Not to my knowledge. One of the concerns was the safety of the people in the water because there were several people in the water itself and had been for some time.

Q. Did you go back to try to get further information from the defendant about where the gun might be, why we are not finding it where he said?

A. Yes, sir.

Q. And did you re-advise him of his warnings on each and every time?

A. Every time I spoke to the gentleman. Yes, sir.

Q. Turn your attention to M.T.S.-8, ask if you recognize that statement of Miranda rights?

A. Yes, sir.

Q.Did you explain the defendants rights on that warning?

A. Yes, sir.

Q. Did he indicate that he understood them?
A. He did.
Q. Did he indicate that he wished to waive those and speak to you?
A. Yes.
Q. All right. And again, did this include requests by the dive team for further information on where the gun might be?
A. Yes.
Q. Following these Miranda warnings, did you, I'm sorry.

BY MR. GARDNER:
Offer, introduce and file into evidence M.T.S.-5 through 8.
BY THE COURT:
Let them be received

EXAMINATION RESUMED BY MR. GARDNER:
Q. Did you likewise travel with Detective Dale Galloway, as well as the defendant, in an effort to further specify where the gun could be found?
A. Yes.
Q. Did you go to U.S. 11 and participate in allowing him to point out where the gun

might be?

A. Yes, sir. I did.

Q. Was there any difference in your understanding of where the defendant had indicated to Major and Juge that the gun might be versus his specifications in the presence of you and Detective Galloway?

A. Say again.

Q. Did you change the location? Did the defendant change the location where the gun might be?

A. No, sir. It was in the same proximity. He maintained the location of where he claimed the weapon was discharged from a car.

Q. Now, did you also go with him to a Shell gas station?

A. Yes, sir.

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Q. For what purpose?

A. During that same drive in the car, in his spirit to cooperate, he said he had discarded the cloth, draw-string type of bag which purportedly had the money involved in the bag and discharged it into a dumpster or trash can at that Shell station.

Q. Did you go with him to that Shell station?

A. He said, I will show you the station.

Q. Was a search conducted there?
A. Yes. It was.
Q. Did you locate the money bag?
A. No, sir. We had called some Jefferson Parish officers who were preparing to do a 24th J.D.C. warrant to search the dumpster, but we found out that the trash had actually been emptied from the dumpster the day before we arrived there. It had been serviced by a local company, so the dumpster was empty.
Q. All right. And finally, I will show you M.T.S.-9, which purports to be a written statement from the defendant about the activities which you have just described in which he went to the dumpster in an effort to locate that bag. I will show you M.T.S.-9 and ask if you recognize that hand-written statement by Jessie Montejo?
A. This is the one prepared by him. Yes, sir.
Q. Witnessed by Detective Galloway; is that correct?

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A. Yes, sir.
Q. Did anyone threaten him in order to have him prepare this written statement of the events and his willingness to help try to find the items from the robbery?
A. In no manner whatsoever.
Q. Did he do so freely and voluntarily?

A. Yes. All most insistent upon trying to locate it.

BY MR. GARDNER:

Offer, introduce and file into evidence M.T.S.-9.

BY THE COURT:

Let it be received.

BY MR. GARDNER:

Tender.

CROSS-EXAMINATION

EXAMINATION BY MR. MCNARY:

Q. Detective Hall, when did you first come in contact with Jessie Montejo in this matter?

A. It would have been -- visual contact or interview, sir? Could you clarify the question?

Q. When did you have any interaction with this man?

A. It would have been early on that Saturday morning, I think it was the 7th, sir.

Q. In what context?

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A. It was an interview, sir. Interview at the investigations office.

Q. The one that you described at what, 3:45 in the

morning on the 7th?
A. Right. Previous to that I had driven to Gretna when he was initially located. I saw him sitting in the office but we didn't have any conversation like we had that Saturday.
Q. Did you hear him ask for a lawyer in Gretna?
A. No, sir.
Q. Did you hear him say he did not wish to accompany anybody from St. Tammany, anybody, he wasn't going anywhere?
A. No, sir.
Q. Detective, were you present when the rights form, when a rights form was executed on 9-7-02 at 7 minutes after mid-night, or all most four hours before you once again had him execute a rights form?
A. I could have been, sir.
Q. I'm sorry?
A. I could have well been if he was in the Slidell investigations office.
Q. Well, if you were not, I am trying to figure out how you could have been there if you didn't come into contact with him until 3:45 P.M.?
A. I could have walked in, given him his rights form and walked out, but we did not have any interactions. If I can qualify the

word interactions, we didn't have an interview at 12:00 o'clock.

Q. Had you been watching on -- I understand there is a video/audio set-up in the interrogation room. Had you been watching the investigation for the twelve (12) hours before you became involved at 3:45?

A. I remember watching the monitor for some period of time. I don't know how long it was.

Q. So, you know this man had been interrogated for twelve (12) hours before you personally took over the interrogation?

A. I don't know how long it was.

Q. I'm sorry?

A. I don't know how long he was interviewed prior to.

Q. Did you start watching the interview at 4:38 on the 6th, 4:38 P.M.?

A. No, sir.

Q. You weren't present then?

A. I don't recall being present.

Q. When did you come to start watching the interview that began at 4:38 P.M.?

A. It would have been in the Slidell investigations office when he was brought from Gretna. I was watching the monitor for a short period of time.

Q. That was Detective Morse and Detective Major, right?

A. I believe so. Yes, sir.

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Q. You watched it for a short period of time at the beginning or at the end of that interrogation?

A. I don't recall.

Q. Which as we understand began around 4:38, had a slight hiatus around 10:02 and then continued for one or two hours depending on the witness?

A. I don't understand the question, sir.

Q. Well, how much of that interview did you watch? Did you watch the first ten minutes or the last two hours or do you know?

A. I don't recall.

Q. What were you attempting to do at 3:45 in the morning that hadn't been done in the previous twelve (12) hours of interrogation?

A. To clear up some of what we termed as discrepancies or inconsistencies of information being obtained relative to the investigation. We spoke to Mr. Montejo in effort to clarify those.

Q. How were you aware of those discrepancies if you hadn't watched any of the previous twelve (12) hours?

A. Information received from other investigators, sir.

Q. Why did you feel it necessary to ask him to sign a new rights form again at 3:45 A.M.?

A. It is my personal practice through my career that on the scope of this investigation

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every time I speak to a defendant he is given his rights.

Q. Did you ask him how long since he had had any sleep?

A. No. I don't recall asking him that, sir.

Q. Was that of any concern to you?

A. Probably not.

Q. But you knew he had previously been interrogated for twelve (12) hours before you took over?

A. I don't know how long he had been interrogated before I took over.

Q. But that wouldn't have concerned you in any event?

A. Probably not because we had been up working the investigation which was ongoing.

Q. The hand-written statement that the prosecutor introduced as M.T.S.-9, when did Mr. Montejo execute that hand-written statement?

A. On the trip in to Gretna.

Q. This was on the afternoon of the 10th, I believe?

A. I recall it was the 9th. We took him out of the correctional center and drove across.

BY MR. MCNARY:

Can I see the exhibit, please?

EXAMINATION RESUMED BY MR. MCNARY:

Q. This says witnessed by Detective Dale Galloway at 19:15 hours on the 10th. Which would

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be 7:15 P.M. in the evening; is that correct?

A. What time 19:15?

Q. 7:15 in the evening; is that 19:15?

A. Yes, sir.

Q. When did you begin interrogating Jessie Montejo on the 10th?

A. The rights form from the 10th, I believe, was a follow-up visit with him at the jail, but there was no interview conducted.

Q. What are the circumstances under which that hand-written document was produced?

A. That was to show that we didn't attempt to coerce or influence him or threaten him in any form, manner or fashion in leaving the jail, and his willingness to go to Gretna in effort to help his case.

Q. Were you present when he wrote that?

A. If I recall, I was present, but we actually afforded him the privacy of my car. I think we were at the Shell station. We in fact stood outside of the car and gave him a moment of privacy.

Q. How long had you had him out of the jail before he produced that at 7:15?

A. Would have been a couple of hours.

Q. So, you went and got him approximately 5:00 in the afternoon out of the jail?

A. It was in the afternoon. Yes, sir.

Q. Detective, are you aware that Mr. Montejo was brought in for a 72-hour hearing and appointed counsel early that morning?

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A. No, sir.

Q. Of the tenth. Detective, there is a minute entry in the record here, Tuesday September 10, 2002, court met this day pursuant to adjournment, present and presiding, his Honor, James J. Gleason, III, Commissioner; Walter P. Reed, District Attorney; Rodney J. Strain, Sheriff and Malise Prieto, Clerk of Court. So, the sheriff's office was present. The defendant being present, this matter came before the Court for 72-hour hearing to determine bond and counsel. The defendant being charged with first degree murder, Court ordered no bond set in the matter, further Court ordered the office of the Indigent Defender be appointed to represent the defendant. That would have been the morning of the 10th, so by that time the sheriff's office had actual knowledge that this man had been appointed an attorney, yet you took him out around 5:00 o'clock and continued to interrogate him; is that correct, sir?

A. No, sir. My notes, my Miranda forms are dated the 9th. As a matter of fact, I had a brief momentary meeting with Mr. Alford that evening. He made reference to he had been contacted or retained or whatever language was used, and I said I had no idea that was occurring, sir.

Q. Well, I am speaking in particular to this hand-written document that was produced at 7:15 on the 10th and it is witnessed by Detective Dale Galloway but I think you indicated you were present when that document was prepared?

A. Yes.

Q. That was probably in the range of ten to eleven hours after the 72-hour hearing?

A. If that's what it would be. Yes, sir. I don't know.

Q. So, you knew by that time he had appointed counsel?

A. No. We did not know that.

Q. Why did you not know that if he was brought down for a 72-hour hearing?

A. We were never notified he had counsel and when I spoke to him at the jail, I said, have you been contacted by an attorney, and he told me no.

Q. If you didn't know it, your office knew it; isn't that correct?

BY MR. GARDNER:

Objection.

BY MR. MCNARY:

Well, it states they were present in court, the sheriff's office.

BY MR. GARDNER:

I have no objection to the document coming in. I have objection to the question.

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BY THE COURT:

What is the basis of your objection?

BY MR. GARDNER:

This witness clearly wants to be factually correct. He wants to be able to tell the Court everything that he knows about the case, but he has no basis to know institutionally who knew what.

BY THE COURT:

I understand your objection. I will sustain the objection because as said, he has no factual basis to know that, but the record will speak for itself. So, I sustain the objection.

BY MR. MCNARY:

I have no further questions for Detective Hall.

RE-DIRECT EXAMINATION

EXAMINATION BY MR. GARDNER:

Q. Detective --

BY MR. MCNARY:

Wait, I'm not going to rest yet, I just don't have any further questions. I want to offer at this time, Your

Honor, the court minute entry which has previously been prepared and made part of the record, Tuesday, September 10, 2002, indicating the 72-hour hearing for Jessie Montejo on the first degree murder that occurred that morning.

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BY MR. GARDNER:
No objection.
BY THE COURT:
Let it be received.
BY MR. ALFORD:
Your Honor, it's already in the record.
BY THE COURT:
Let it be noted.

EXAMINATION RESUMED BY MR. GARDNER:

Q.Detective, at any time during your conversations with the defendant during the early morning hours of September 7th, did he indicate to you he was to tired to speak with you?
A. No, sir.
Q. And had you been up for some period of time likewise?
A. Yes, sir. Several of us had.
Q. Everybody involved had been up overnight?
A. It was an ongoing investigation. Yes, sir.

Q. During your conversations with the defendant subsequent to the 3:45 A.M. conversations when you continued to re-advise him of his rights, at any time during the execution of any of those rights forms did the defendant indicate to you that he did not want to speak with you?
A. He did not what, sir?
Q. That he didn't want to talk to you?
A. No.

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Q. Or did he indicate he wanted to have a lawyer present?
A. No.
Q. At any time during any of those conversations did the defendant indicate to you that he had a lawyer now?
A. No. If I recall, like I said, I made inquiry, have you been contacted by counsel? He said no, I don't need one. I just want to clear all this up. No.
Q. Okay. Then I guess my last question would be, did the defendant bring to your attention at any time that he had gone to a 72-hour hearing?
A. No. He did not.
Q. Or that he had been appointed counsel?
A. No. He did not.

Q. Until Mr. McNary asked you that question and even now, do you have any independent knowledge of the defendant having been appointed counsel at any time on the 10th?

A. No, sir.

BY MR. GARDNER:

I have nothing further of this witness.

BY THE COURT:

You may step down.

BY MR. GARDNER:

We have no further witnesses at this time. It's my understanding that both counsel would produce any video tapes or audio tapes we saw fit and that the Court

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would hold this motion open until the Court is able to review.

BY THE COURT:

Let's find out if the defense has any witnesses.

Any witnesses?

BY MR. MCNARY:

Yes, Your Honor, we will probably call the defendant, but we would like to do that when the tapes have been --

BY THE COURT:

Any witnesses today? Right now?

BY MR. MCNARY:

No. Not today.

BY THE COURT:

The point is as I had indicated at the bench conference because the tapes need to be seen, I will continue this hearing on motion to suppress any statement and motion to suppress evidence. I will conclude the hearing today and continue the hearing until such time as I am going to set a date because it is my practice to give people time certain so they know where they are going.

And would you mind getting my calender on the right-hand corner of my desk.

What I would ask counsel, both the State and defense to do is review these tapes and I am certainly not opposed to watching the tapes in their entirety, but

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if you can maybe redact them, I would appreciate that. On the other hand, if you feel that the entire tape needs to be seen, I certainly have no problems with that either.

When is my next --

BY MR. GARDNER:

Can we approach.

BY THE COURT:

Sure.

(Bench conference held)

BY THE COURT:

Let's do it the 18th. I would say 9:30 because I have arraignments. Let's just say 1:30.

Court is adjourned.

TWENTY-SECOND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA

STATE OF LOUISIANA
VERSUS NUMBER: 355706
JESSE JAY MONTEJO

TRANSCRIPT OF PROCEEDINGS taken before the Honorable Donald M. Fendlason, Judge Presiding, Division "H", Twenty-Second Judicial District Court, Parish of St. Tammany, State of Louisiana, on May 18, 2004, in Covington, Louisiana.

APPEARANCES:

RONNIE GRACIANETTE, ESQ.
SCOTT GARDNER, ESQ.
(ASSISTANT DISTRICT ATTORNEY)

WILLIAM ALFORD, ESQ.
KEVIN MCNARY, ESQ.
(ATTORNEY FOR JESSE MONTEJO)

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BY MR. GRACIANETTE:
Good Monday. Ronnie Gracianette representing the State of Louisiana.
MR. ALFORD:
Your Honor, William R. Alford, Jr., along

with J. Kevin McNary representing the defendant.

BY MR. GRACIANETTE:

This is number in 355706, State versus Jessie Montejo. It's a continuation of the motion hearing that we had several weeks ago. The defense attorney and I were going to through the relevant portions of the tape. We can get to the five points and resolve it quickly. Your Honor, we would also like to indicate that Mr. Montejo is present in open court.

BY THE COURT:

Yes. Let the record reflect that. I think I will leave the bench, unless you need me to sit here while you all try to find it. Will the bailiff come get me maybe.

(AT THIS TIME, A RECESS WAS TAKEN.)

BY MR. GRACIANETTE:

Scott Gardner has joined us.

We ended this hearing from the last court date from the purpose of redacting the videotape of the defendant's statement from the police.

What I have done, I have shown a copy, what is my next exhibit number?

I mark it as State's Exhibit ten for this motion hearing. This is the taped portion of the first taped statement given by the defendant.

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Towards the very end of tape and then the

beginning of the next taped statement, which takes place a few minutes later, these two tapes are the entirety of the conversations that were recorded on the videotape.
What we have done is taken the relevant portion of this and put it in as State's Exhibit number 10, and we brought up a TV set from the D.A.'s Office.
Is that your understanding, Mr. Alford? Is that correct?
BY MR. ALFORD:
Well, that's what you are saying and I certainly wouldn't disagree with you.
BY MR. GRACIANETTE:
You have viewed this portion of this tape, you are comfortable with this.
BY MR. ALFORD:
Your Honor, we reviewed, we have seen some things today that we did not see on the tapes that were provided earlier. And I don't know why that is.
BY MR. GRACIANETTE:
Things are different on this tape --
BY MR. ALFORD:
Well, the tapes, doesn't -- the tape that we saw does not show asking for a lawyer, right?
BY MR. MCNARY:
No. It ended before that.
BY MR. GRACIANETTE:
Judge, let me say this. Let me explain.

There is a problem with the right channel on the

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the videotape equipment. When you put on the regular video portion the hum that you hearing by using this particular equipment, we can channel this channel to that, and you can hear what's going on. That maybe the reason why they could not hear the defendant asking for the attorney on their portion of the tape. With your permission, I will show you what I am talking about.

BY THE COURT:

All right.

(At this time the videotape was played.)

BY MR. GRACIANETTE:

Now you can hear the hum of this tape, interferes with your ability to hear. When you put on the distinct channel, you are hearing fine. So I have shown this to the defense attorney. So you can clearly what's being said and hopefully he will be able to hear on the videotape just by adjusting his channels.

BY MR. ALFORD:

As of today, we haven't, Mr. Gracianette has taught us a lesson on electronics, Your Honor. We didn't know that.

BY MR. GRACIANETTE:

With your permission, the state would offer, file and introduce State's Exhibit number 10, which is the relevant portion of the defendant's video tape and ask that it be published to the judge.

BY THE COURT:

I am going to allow it to be shown now. And I think, has the defense seen the tape that is

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about to be shown to me?

BY MR. ALFORD:

We have seen portions of it earlier when the court was in recess.

BY THE COURT:

Well, why don't we watch this and then we will entertain the admission of the tape at the conclusion of this hearing.

BY MR. GRACIANETTE:

Thank you, Your Honor. I am going to start the play button. I will give you the remote control.

BY THE COURT:

No. I want you to control that.

BY MR. GRACIANETTE:

Yes, sir.

(At this time the tape was played had for the court.)

BY MR. GRACIANETTE:

That's basically his statement to police after that.

BY MR. ALFORD:

May I see one of the rights forms, please? Your Honor, we feel that we need to call officer Major and Officer Morris back to the stand. They are not available and the reason that we do is, the fourth Miranda rights state, if you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you wish. We want to know what efforts these officers made to get him a lawyer once he requested one. Now, because I think the law

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requires that they make an effort once he requests a lawyer, because they state right in there that they will do it. They said we will provide you with one.

BY MR. GRACIANETTE:

Judge, from the first tape as soon as he requested attorneys, the officers stood up and walk out of the room. He withdraw at his request. Come back in. I want to talk. I want to talk. Stopped the videotape. Come back in later, retape the portion where he says he wants to talk. Therefore, I think any questions regarding their efforts to find a lawyer are irrelevant, which is based on the request.

BY MR. ALFORD:

Your Honor, with all due respect to the state, that portion is absent from the tapes. There is a blank in the tape. He asked for a lawyer, and then there's a blank, and we don't know, the tape doesn't show how many minutes later, we don't know how long afterwards the officers come back into the room. And I think if Miranda means anything, it means everything. And once, I mean, we already know, for example, that on September the 1st he was appointed a lawyer. He was appointed the public defender. The sheriff's office was present. They had to know or should have known that he had been appointed a lawyer. They even continued to question him after that, after knowing or being put on notice that he had a lawyer. So we would like an opportunity to review the tapes in more detail,

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and we thank the prosecutor for showing us that. We couldn't understand half of what was being said before. And I think he has shown us how to understand it. I still have some difficulty in understanding exactly what was going on. But we think we need the two officers back. We would like an opportunity to look at the tapes under better electronic conditions, and, of course, eventually we want to put the defendant on the stand.

BY MR. GRACIANETTE:

For purposes of the record, the taped

statement that was made and the Miranda rights were given on September 6, I think the several days before the PD was appointed.

BY MR. ALFORD:

No.

But I think the court will recall from the first hearing, that even as late as September the 10th, as a matter of fact, there's a statement in the record, dated September the 10th, in the a.m., in the p.m. hours, September the 10th, 1915 hours. I was never in the military. Where he is giving a statement. He had been appointed a lawyer that morning, and the record shows that.

BY THE COURT:

Just a minute. We have got the taped statement made that I just observed.

BY MR. GRACIANETTE:

September the 6th.

BY MR. ALFORD:

Yes.

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BY THE COURT:

So that is before September 10.

BY MR. ALFORD:

No question about it. No question about that. I think it went past midnight.

BY THE COURT:

All right. But it was before the 10th.

That's the critical thing.

BY MR. ALFORD:

Right.

BY THE COURT:

One person is talking about one date and another one is interrupting before I can keep it separate.

BY THE COURT:

Mr. Gracianette, as I clearly understand it now, the tape that I just saw was before September the 10th.

BY MR. ALFORD:

That's correct.

BY THE COURT:

And he was told, I am appointing the public defender's office to represent you. I guess the state did that before one of the judges.

BY MR. ALFORD:

Commissioner Gleason.

BY THE COURT:

All right. Commission Gleason did that. So what is the relevancy of that, if the tape was made on the September the 6th.

BY MR. ALFORD:

That's just in the total picture. Your

Honor, I mean, the court may well find that any statement made prior to September the 10th is admissible and any statement made after the tenth is not. The court may find all of the statements admissible. The court may find none of the statements admissible.

BY THE COURT:

Exactly.

BY MR. ALFORD:

That's all I was trying to point out.

BY THE COURT:

I understand. Now, where are those two witnesses that you asked for? Mr. Gracianette, do you know?

BY MR. GRACIANETTE:

Judge, I think what happened was, we had the testimony taken at the last court date and this matter was continued solely for the purpose of the -- It was not anticipating two witnesses to be required. Mr. Alford approached me right before the hearing --

BY THE COURT:

Where are they?

BY MR. GRACIANETTE:

One is a Mandeville police officer who might be available to, and the other one is in New Orleans and he would be difficult to notify.

BY THE COURT:

Well, I would like to, and I don't recall from the last hearing, and I guess that is one of the pit falls because to have two-day hearings such as this, I don't recall but I do think it

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might be relevant to the overall understanding of the court and all the parties to know how much

time did elapse between, when the officers said, when the defendant said, I want a lawyer, they stood up, terminated the interview, the tape was blank, how long a period of time elapsed from that moment until they went back in there and what prompted them to go back in there, you see.
So I think they might have testified to that. But to be quiet frank, because I don't have the transcript here in front of me, I do not recall what the answer was. That's the reason for it. So I am going to allow those officers to come and testify.
BY MR. ALFORD:
Your Honor, and we would ask for the purpose of edification of all of us, that the transcript of the first hearing be made available, because my distinct memory is that at all times the tape was on, that there were no blanks. That is my recollection of what the officers testified to. Now, I have been wrong before, not many times.
But you know, I have been wrong before. But I would --
BY THE COURT:
Well, I think Mr. Alford, we can all say that we have been wrong before.
BY MR. ALFORD:
Right. So I think when we do, we should have the transcript of that first hearing.
BY THE COURT:

Well, and just as a reflection on what your

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recollection is, I seem to recollect that there were breaks in there and it was a long-standing and I believe, I don't know whether the transcript will clearly show that or not, but I seem to recollect that much. But I too might be wrong. I am wrong from time to time and the First Circuit writes, sends me stuff back to me to correct, you see. Anyway, what I am going to do is, I guess, continue this hearing until the opportunity for the officers to be present. I don't believe their testimony would be that long.
Perhaps we can bring it up on my rule day, which is set for June 1st.
BY MR. GRACIANETTE:
That's coming up pretty fast.
BY MR. ALFORD:
We don't have a problem with that.
BY MR. GRACIANETTE:
June 1. Can we do it in the afternoon?
BY THE COURT:
We can do it in the afternoon or early morning, or eight o'clock that night.
BY MR. GRACIANETTE:
Judge, keeping in line with not being right all the time, Jerry Hall testified at the last hearing about events that occurred on September 9th, 2002. He went back and checked his

records and realized his testimony applies to September 10th date. When Mr. Gardner found out that discrepancy, he sent a letter to Alford and McNary indicating that it was a mistake and made sure both attorneys knew that.

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BY MR. ALFORD:

Your Honor, we would acknowledge that is absolutely correct, the officer was referring to September 10th, inadvertently said September the 9th.

BY THE COURT:

I would like officer Hall and the other officers to be here present to be questioned. And I guess, also, you need to give defense the opportunity to review the entirety of the tapes to satisfy themselves that what the statement has presented is indeed the amendment of the original Tapes

BY MR. GRACIANETTE:

Yes, sir.

BY THE COURT:

We are going to have the tape present itself and I would be amenable to observing that.

BY MR. ALFORD:

Your Honor, we don't make the allegation that the state has intentionally failed to supply us with anything. It's, we do think, we were not able to view the part that you saw. Maybe it was In part because we didn't know how to do it. We will look at that again. I think we should be able to resolve that problem.

BY THE COURT:

Well, I wanted to make the opportunity available to defense counsel in the events that is used, so they will have their copy made of what I call the pertinent sections of the entire interview. Well, that being said, we will then,

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I guess, continue this hearing to the June 1 date, and I would propose Mr. Alford set the time.

BY MR. ALFORD:

Yes. But 1:30 would be much better for us.

BY THE COURT:

I would think even as late as four o'clock. Because I have a criminal rule day and pre-trial. Those are pretty long days for me. But I will be willing, I think it would be more, to allow me to move the docket and, so, I would be amenable to three or four o'clock.

BY MR. GRACIANETTE:

Yes, sir.

BY THE COURT:

Which do you prefer?

BY MR. GRACIANETTE:
How about 3:30?
BY THE COURT:
3:30.
BY MR. MCNARY:
Whatever the court.
BY THE COURT:
3:30. If we get to it later than -- If you are here earlier and we finish, we will take it up earlier. But I would think that would be a good time, 3:30 on June 1. And we will, I guess, continue this hearing until that date.

TWENTY-SECOND JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
PARISH OF ST. TAMMANY

THE STATE OF LOUISIANA DIVISION: "H"
VERSUS NUMBER: 355706
JESSE JAY MONTEJO

THE HONORABLE DONALD A. FENDLASON
JUDGE

A Transcript of the Proceedings Taken in Open Court at Covington, Louisiana, on June 1, 2004

MOTION TO SUPPRESS

APPEARANCES:

REPRESENTING THE STATE OF LOUISIANA:
SCOTT GARDNER, ESQ.
And
RONNIE GRACIANETTE, ESQ.
Assistant District Attorneys

REPRESENTING THE DEFENDANT:
WILLIAM R. ALFORD, III, ESQ.
And
KEVIN MCNARY, ESQ.
Public Defender's Office

BY MR. GRACIANETTE:
Judge, this is matter 355706, State versus Jessie Montejo. Ronnie Gracianette and Scott Gardner representing the State.
BY MR. MCNARY:
Kevin McNary, Your Honor, representing Jessie Montejo in company with William R. Alford, III, also present in open court with the defendant.
BY THE COURT:
Thank you.
BY MR. GRACIANETTE:
Judge at the last hearing I think the defense counsel requested we produce John Morse, Wade Major and I think Jerry Hall back here for purposes of continuation of the motion hearing. We have all three officers present in the courtroom. I think this is going to be cross-examination.
BY MR. ALFORD:
Your Honor, we would ask that Detective Major be called as the first witness, that the other two witnesses be sequestered.
BY THE COURT:
Very well. Witnesses, you're under

sequestration, that means don't discuss your testimony with the other parties. Come on up, please.

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DETECTIVE WADE MAJOR
AFTER HAVING BEEN DULY SWORN
WAS EXAMINED AND TESTIFIED
AS FOLLOWS:

DIRECT-EXAMINATION

EXAMINATION BY MR. MCNARY:

Q. Good afternoon, Detective Major. Detective, you have already testify in this matter previously, so I will try to get right to the crux of what we are trying to get at this evening.
You, as I recall, picked up the defendant in Gretna; is that correct?

A. Yes, sir.

Q. When he was in Gretna did he ask at that time for an attorney?

A. No, sir.

Q. Did you question him in Gretna or while on route to Covington?

A. I didn't. No, sir.

Q. Did he in your presence at any time ask for an attorney?

A. No, sir.

Q. So, we know that a request for an attorney was made, but that was not in your presence?

A. It was in my presence. Yes, sir.

Q. It was in your presence?

A. That was later that evening. Yes, sir.

Q. When that evening did that occur?

A. During our taped interview of him. I don't know the exact times, but it was some time before 10:00 o'clock that night.

Q. Okay. That is the incident where essentially there is some back and forth and you tell him we don't believe you, but is that your story, you're sticking to it, and he at that point he says something -- well, I think he says, I'm not going to say anything else without a lawyer?

A. Yes, sir.

Q. And I don't know, is it you that then says, all right then you're under arrest for first degree murder?

A. No, sir.

Q. But you were there when that occurred?

A. Yes, sir.

Q. And really, all I am trying to do is make sure we are talking about the same incident. You recall that when he says, okay, I want a lawyer, and then somebody, apparently it was not you, but one of the other detectives said, okay, then you're under arrest for first degree murder and then that first tape ends rather shortly thereafter?

A. I wasn't aware that the tape ended, sir.

Q. Now, after he asks for an attorney at that point, did you take any steps to get him an attorney?

A. No, sir. We left the room and told him the interview was over.

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Q. You left the room and told him the interview was over?

A. Right. We told him once he requested an attorney then we could no longer speak to him.

Q. So, you all leave, he is still sitting in the room by himself?

A. I left the room first. Detective Johnny Morse was right behind me. When he realized we weren't going to talk to him any more he decided he no longer wished to have an attorney present.

Q. All right. Now, were you in charge of taping the interview?

A. No, sir. I was not.

Q. Who was?

A. I really don't know, sir. The tape recorder is in another area of the building. I wasn't even aware there was even tape rolling when we did the interview.

Q. All right. Well, we know that we have hours worth of tape of interviews, who decides whether or not an interview is taped?

A. I guess the case agent which would be Detective Morse.

Q. Detective Morse?

A. Yes, sir.

Q. Have you seen the tapes at all in this matter?

A. No, sir. I haven't.

Q. So, you're not aware then that shortly after the defendant asks for an attorney and he is told all right then you're under arrest

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for first degree murder, people start leaving the room, one of whom, I guess was you, that the tape ends shortly thereafter?

A. No, sir. I had no idea that it did.

Q. You don't know who ordered the tape be switched off at that point?

A. No, sir. I don't. I am assuming that whoever was running the video recorder and audio recorder just thought the interview was over and stopped it.

Q. Is the normal procedure when a defendant says I'm not saying anything else without a lawyer to go ahead then and try to get a lawyer over there?

A. No, sir. Well, we assume that the courts will appoint him an attorney on another date. So, we just end the interview.

Q. Okay. But in this case we know that the interview did not in fact end, but in fact began again?

A. Yes, sir. It did.

Q. Were you there when the interview began again?

A. Yes, sir. I was.

Q. How long was the interval between when the defendant said I want a lawyer and the interview ended before it once again began?

A. I would say probably ten minutes or so.

Q. Ten minutes?

A. Just guessing. I don't have any idea, sir.

Q. Well, could it have been more than ten minutes?

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A. Yes. It could have.

Q. Could it have been less than ten minutes?

A. Yes, sir. It could have.

Q. Ten minutes is just your best guess?

A. I would estimate it at ten minutes. Yes, sir.

Q. What did you say to the defendant during that time period?

A. I don't think I ever returned to the room. I think I went to the video monitoring room which is in Major Fred Oswald's office and I think I ate a piece of pizza.

Q. So, you don't recall speaking to the defendant at all before he began to speak again on the second tape?

A. No, sir.

Q. Were you present when he began to speak again on the second tape?

A. I believe I was. Yes, sir.

Q. I guess that's not a good question. Were you present when he began to speak again, you don't know whether the tape was running or not?

A. No, sir. I was in there shortly thereafter I not there when the second interview started.

Q. So, you're telling us that you don't know what conversation was had between the defendant and any other law enforcement officer in between that interim period in between the two interviews because you weren't there and you think you were in the monitoring room eating a pizza?

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A. I don't think anyone spoke with him during that time period.

Q. I am curious then how is it that supposedly he told some police officer that he wanted to begin talking again. So, if nobody spoke to him during that time period how did that happen?

A. Well, that actually occurred as we were leaving the room when he said he wanted an attorney we left the room at that point. Before we even got out of the room good Mr. Montejo started changing his mind wanting to speak with us and of course we went and had a conference among ourselves to see what legalities was if he changed his mind, could we not go back in there and finish the interview, which inevitably is what happened.

Q. So, you're telling us that whatever it was in the way of him changing his mind is on that tape?

A. I don't know sir. I haven't seen it. I am

assuming so.
Q. Well, as best I can tell, that first tape ends with him saying he wants a lawyer, everybody leaves. It could possibly be from the poor quality of the tape and our inability, we don't have any sophisticated means of switching channels on the audio portion so we can get rid of that hum, but I didn't see anything on that tape whereby he changed his mind. That's on tape?

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BY MR. GARDNER:
Judge, the tape will speak for itself. Objection.
BY THE COURT:
I think the tape speaks for itself.

EXAMINATION RESUMED BY MR. MCNARY:
Q. And you haven't seen the tape?
A. No, sir. I haven't.
Q. Were you present when he changed his mind and said all of a sudden that he wanted to make a statement again?
A. Yes, sir. I was.
Q. What exactly did he say?
A. We told him -- exactly, I couldn't tell you Mr.

McNary, but as we were leaving the room and he realized that we were going about our business since he had requested an attorney, I don't know what his motivation was for changing his mind and deciding that he wanted to continue talking to us, I have no idea.

Q. And you didn't hear anybody speak to him? Of course, you weren't present that whole time, you went down and ate some pizza or whatever it is that you did?

A. Yes, sir.

Q. So, you don't know if any other law enforcement officers were in fact talking to him during that time?

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A. I couldn't tell you positively, but I don't think so. I don't think anyone went back in there.

Q. But you don't know?

A. No, sir.

Q. And your best guess is it was ten minutes, but that's only a guess?

A. Yes, sir.

Q. How long was Mr. Montejo in custody before he asked for a lawyer?

A. Several hours, sir.

BY MR. MCNARY:

I have no further questions at this time. Thank you officer.

BY MR. GRACIANETTE:

Judge it might help the officer to refresh his memory if we show him that brief portion of the video tape toward the end. We have the video tape player in the back hall. It would take me two minutes to set it up.

BY THE COURT:

I'll allow it.

(Video equipment set-up)

BY MR. GRACIANETTE:

I will fast forward a little bit to get to that portion.

BY THE COURT:

Detective, can you see it?

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BY DETECTIVE MAJOR:

Yes, sir.

BY THE COURT:

Mr. Alford, can you and your client

see the picture?

BY MR. ALFORD:

I believe we can, Your Honor.

BY MR. GRACIANETTE:

I will fast forward to get to the relevant part.

(Video tape played)

BY MR. GRACIANETTE:

Okay, Judge, I will play the portion of the video tape.

BY THE COURT:

Let's here a little more.

BY MR. GRACIANETTE:

Yes, sir. I will rewind it again to the relevant portion.

(Video tape played)

CROSS EXAMINATION

EXAMINATION BY MR. GRACIANETTE:

Q. Officer, you have seen the second portion of video tape again. The tape cuts off right when he is saying, I don't want -- would you complete that sentence based upon your recollection?

A. He didn't want an attorney any longer.
Q. Before that he said twice to you, come on, come on, indicating come back in, I want to talk to you?
A. Yes, sir.
BY MR. GRACIANETTE:
Would the Court like to see it again.
BY THE COURT:
No.
BY MR. GRACIANETTE:
Thank you. No further questions.
BY MR. MCNARY:
Brief re-direct, Your Honor?
BY THE COURT:
Go ahead.

RE-DIRECT EXAMINATION

EXAMINATION BY MR. MCNARY:
Q. So, Detective, to your mind he was saying come on, come on, I want to talk to you again?
A. Yes, sir.
Q. He doesn't say that though. He doesn't say anything about wanting to talk again?
A. Yes, sir. He did. He said he didn't want a lawyer, he wanted to continue the conversation.
Q. On that tape he said that?

A. No. Just after that tape ended.
Q. We need to know who was running this tape. It begs credibility that a Detective like yourself does not know who runs the tape

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when you are interviewing a murder suspect.
BY MR. GRACIANETTE:
Objection. He is now arguing with the witness regarding who is running the tape and the credibility of that person.
BY MR. MCNARY:
Let me ask it a different way.

EXAMINATION RESUMED BY MR. MCNARY:
Q. If you don't know who was running that tape, who would?
A. I have no idea. Like I said, I didn't even realize we were recording at that point.
Q. You will admit that at this crucial point, right before he says allegedly what you said he said, about changing his mind, the tape ends?
A. Yes, sir. It appears so.
Q. You don't know who was running it

and you don't know who cut it off right then?

A. No, sir.

Q. All right, sir.

BY MR. MCNARY:

I have no further questions. Thank you, Detective.

BY MR. GRACIANETTE:

Nothing further.

BY MR. MCNARY:

Call Detective Morse.

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DETECTIVE JOHN MORSE
AFTER HAVING BEEN DULY SWORN
WAS EXAMINED AND TESTIFIED
AS FOLLOWS:

DIRECT EXAMINATION

EXAMINATION BY MR. MCNARY:

Q. Good evening, Detective Morse?

A. Good evening.

Q. Detective Morse, were you the case agent on this case?

A. Yes, sir. I was.

Q. So, that means what, the lead investigator?

A. Yes.

Q. Detective Morse, were you the person who was in charge of the video taping of the interviews of Montejo?

A. In what regards, sir?

Q. I mean did you make the decision when to turn on the camera, when to turn it office?

A. No, sir.

Q. Were you physically there doing anything with the camera?

A. No, sir.

Q. All right. Who was?

A. Major Fred Oswald and Captain David Hall made the decision as to when the tape was turned on and off.

Q. Who actually turned the tape on and off?

A. I don't know. I wasn't in that room.

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Q. Where is the control that turns the tape on and off?

A. It is in the Major's office which is, I would say, around the corner from the interview room.

Q. In Major Oswald's office?

A. That's correct.
Q. There is a monitoring unit in his office?
A. Yes, sir.
Q. So, in Major Oswald's office you can see and hear what is going on, and you can also turn the tape on and off?
A. That's correct.
Q. Is the camera itself, the controls for it, are in the Major's office?
A. To activate it and turn it off, yes, sir.
Q. So, it is a remote camera? You don't actually have to walk up to the camera and push a button, there are controls for it in the Major's office?
A. That's correct.
Q. So, if you're in the room conducting an interview you really don't have any control over what happens on that camera, that's done in a remote location or in the Major's office?
A. As far as physical control over it, no.
Q. Are you in communication with the Major's office through an ear bug?
A. No, sir.
Q. You're not. So that whatever decision is made to turn that camera on and off is totally

without any input from you or anybody else that might by interviewing at that time?

A. Well, that's not necessarily accurate.

Q. Well, please explain it to me because I clearly don't know how it works?

A. Yes, sir. We could pre-determine at what point by conversation, at what point they would turn it on or off. Theoretically we could leave the room and ask him to turn it on or call him on a cell phone from in the room. There are several different ways that we could have that done.

Q. All right. On that particular evening when the defendant said I'm not answering any other questions without a lawyer, he was then advised, I think by you, well then, you're under arrest for first degree murder?

A. Yes, sir.

Q. That particular evening, in that particular time frame is what I am talking about, when those incidents occurred you and the other Detective get up, all right, we got nothing more to say to you right now.

You want a lawyer. There is a little bit of commotion and he starts saying, come on, come on, then the tape ends. Have you seen the tape recently? Do you know how it ends?

A. Yes, sir. I have seen the tape.

Q. Now, Detective Major indicated that right after the tape ends then the defendant says

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something about, oh come back, I want to talk some more?

A. I believe he says that prior to the tape ending, sir.

Q. Well, he says come on, come on. He says that a couple of times. He doesn't say anything about I want to talk some more?

BY MR. GRACIANETTE:

Judge, the tape speaks for itself. I think the officer has the right to see the tape to refresh his memory.

BY MR. MCNARY:

That's fine. Let's roll it again.

(Tape played)

BY DETECTIVE MORSE:

His last comments were, I don't want

an attorney.

BY MR. MCNARY:

Could we hear that again, just that last.

BY MR. GRACIANETTE:

Sure.

(Tape played)

EXAMINATION RESUMED BY MR. MCNARY:

Q. So, he does say apparently, I don't want an attorney a couple of seconds after saying he did want an attorney?

A. Correct.

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Q. Okay. Now, what transpires after that, after the tape goes off?

A. We left the room.

Q. So, he says I don't want an attorney, you left the room?

A. Yes, sir.

Q. So, apparently you left thinking he still wants an attorney?

A. No, sir.

Q. Why did you leave the room? Why didn't you continue interrogating him right then?

A. Because we wanted to give him a minute to think About what he wanted to do, return back in there. I wanted to speak to my supervisors regarding the legality of going back to speak with him and so on.

Q. How long did that take?

A. I would say ten minutes or less.

Q. Then what?

A. I returned to speak to him, asked him what his intentions were. He adamantly requested that we speak to him again.

Q. Have you seen the second tape and where it begins?

A. Yes, sir.

Q. Is it fair to say there is a gap between where that tape ends and the second tape begins?

A. Yes, sir.

Q. Are you telling the Court that nobody, no law enforcement officer spoke to the defendant between when that tape ends and the second tape begins?

A. No, sir. That's not what I am saying.

Q. Did you speak to the defendant in that gap?

A. Yes. I did.

Q. What did you speak to him about?

A. I asked him what his intentions were. Did he understand the ramifications of what he said. Basically, I wanted to ensure that he had changed his mind.

Q. Did you speak to him about the difference between murder and manslaughter?

A. No, sir.

Q. That never came up?

A. No, sir.

Q. Did you tell him that if he refused to make any further statements and wanted a lawyer that he would more than likely get the death penalty?

A. No, sir.

Q. You didn't tell him that?

A. I did not.

Q. You didn't tell him that if he continued to make a statement he could possibly be charged with manslaughter?

A. No, sir.

Q. Did any other detective, or any other

law enforcement officer, do any of those things in your presence?
A. No, sir.
Q. Do you know of any of those things being said to the defendant?
A. During this time period?

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Q. Yes, sir. During that gap between when the first tape ends and the second begins?
A. No, sir.
Q. Did you ever speak to the defendant separately from Detective Major during that time period?
A. Yes.
Q. Did Detective Major speak to the defendant without you being there, do you know?
A. I don't recall. It is possible.
Q. My notes indicate that Detective Major, the first day of this hearing indicated that he did in fact instruct the defendant of the difference between murder and manslaughter?
A. During that time period.
Q. Yes?

A. That's possible.

BY MR. GARDNER:

Judge, I will lodge an objection. I don't recall any testimony with regard to this period of time specifically that at any time Wade Major said during that period of time he spoke with the defendant about manslaughter versus murder. Again, my memory is not perfect, but I don't recall anything.

BY MR. MCNARY:

Well, my notes -- actually, I don't know that I had a time frame noted there.

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EXAMINATION RESUMED BY MR. MCNARY:

Q. Did Detective Major in your presence at any time mention to the defendant the difference between murder and manslaughter?

A. That's possible. I don't specifically recall it though.

Q. You yourself, you indicated, never had any kind of discussion of that nature with the defendant at any time?

A. I don't believe that I did.

Q. Your discussion with the defendant during this gap in the taped interviews consisted again of what?

A. I wanted to ensure that he had changed his mind. I asked him why, and questions along that nature.

Q. Now, you do that again on the tape, do you not?

A. Yes, sir.

Q. So, you're saying that you had other conversations of that similar nature during the time period when the tape wasn't rolling?

A. Yes, sir.

Q. Then continued it on the tape?

A. Yes.

Q. That this whole gap in the taping to your estimation was around ten minutes?

A. Ten to fifteen (15) minutes.

Q. That's also what Detective Major said. Did you and he discuss this time period between tapings at any time during this hearing?

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A. I'm sorry. I don't understand your question.

Q. Did that come up since this hearing began a month or two ago, as to what the time period was between when one tape ended and the other begins? Have you and he discussed that whatsoever?

A. No, sir. I don't recall discussing that with him.

Q. Detective, did anybody at any time after the defendant indicated he would like an attorney, did you take any action at that point in time to try to get an attorney over there for him?

A. No, sir.

Q. Did you call the Public Defender's office?

A. I did not. It was my intention to bring him to the jail and book him at that point.

Q. And the whole indication, if you would, that the defendant had changed his mind and wanted to speak to you again, was what we saw on that tape at the very end there when he says I don't want a lawyer?

A. That was not the whole conversation. Like I said, we did have a conversation between that tape and to the second portion of it regarding that.

Q. Which is not on any tape?

A. The interim portion is not.

Q. Yes. Okay. Detective, I have noticed that generally in interviews from your office when they are done on video tape there is

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generally a date and time stamped on the bottom of the tape; isn't that true?

A. I don't know that that is. I have never paid attention to it.

Q. Certainly you have the capability with your devices to put the date and time when the tape is running?

A. I don't know.

Q. You will agree that there is no such date and time stamped on any of the tapes we have seen here?

A. I didn't see one.

Q. So, of the sheriff's office personnel that I have seen here able to testify today, it is your testimony that to the best of your knowledge Detective Hall would have been in Major Oswald's office when the taping was occurring?

A. I don't know, sir.

Q. Did you not testify to that earlier?

A. At what point of the interview?

Q. Well, when I asked you who is in control of when the camera goes on and off, I thought you indicated Major Oswald?

A. I apologize. I am thinking of Detective Jerry Hall as opposed to Captain David Hall. Captain David Hall and Major Fred Oswald would have been in charge of that.

Q. Well, then I apologize to you because I clearly was not remembering as I should have known there are in fact two different Halls, and

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David Hall is not here today Jerry Hall is?

A. That's correct.

Q. So, neither David Hall nor Major Oswald are here today? Neither of those two individuals who probably, at least one of whom, were in Major Oswald's office at the time, neither of them are here today?

A. That's correct. Neither of them are here.

BY MR. MCNARY:

Thank you. No further questions.

BY THE COURT:

You may step down.

BY MR. MCNARY:

Call Detective Jerry Hall.

DETECTIVE JERRY HALL
AFTER HAVING BEEN DULY SWORN WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

EXAMINATION BY MR. ALFORD:

Q. May name is Bill Alford and we have met before. I just learned something for the first time. I didn't realize there were two Halls on the sheriffs office.

A. Yes, sir.

Q. With the sheriffs office?

A. That has caused a point of confusion a few times. No relation, counsel.

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Q. Have you seen any of the tapes of statements allegedly made by the defendant?

A. Just briefly a couple. They were on the monitors at different times.

Q. When did you first come in contact with the defendant?

A. Can you clarify at what contact we are talking about, sir? Physical contact or video because you just represented a video?

Q. No, physical contact.

A. I observed him in the City of Gretna. We went to Gretna to pick him up. Gretna Police had detained him.

Q. Did you talk to him in Gretna?

A. No, sir.

Q. Who talked to him?

A. I believe it would have been Detective Major or Detective Johnny Morse.

Q. Were they talking to him within your ability to hear? Could you hear what they were saying to him?

A. No, sir. I think they were in an adjacent room. I was in another room speaking with Gretna officers.

Q. So, you wouldn't know if he asked for a lawyer

or he didn't ask for a lawyer?
A. No, sir.
Q. Are you aware of him asking for a lawyer at any point in time?
A. No, sir.
Q. You're not?
A. No, sir.

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Q. All right. On the 10th, was it September, 10th, I believe?
A. I'd have to check that date.
Q. Go ahead and check.
A. Yes, sir.
Q. Were you aware that Mr. Montejo had been appointed a lawyer?
A. No, sir.
Q. You were not?
A. No, sir.
Q. Are you aware that there exists in this record a certified court document that shows in the early morning of September 10th, he was appointed the Public Defender's office; are you aware of that?
A. Just from the last hearing, I think we had. You offered or introduced into evidence some records relative to that, but I don't

know if they do exist.

Q. The record indicates that the Sheriffs office was represented at that hearing; do you recall that?

A. I reference, again, you offered and introduce into the record at the last hearing, Counselor, I don't know what it said.

Q. This is a minute entry from September 10th, I don't know if you have had a chance to look at it or not.

A. No, sir. I have never seen this.

Q. You have never seen that?

A. No, sir.

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Q. Will you agree that it indicates that a representative of the St. Tammany Sheriffs Department was present?

A. It is referenced as Rodney J. Strain, Sheriff.

Q. A representative of Rodney J. Strain?

A. Not a representative, it says Rodney J. Strain, Sheriff.

Q. And what it does is it says present, Walter Reed, who of course we know was not present, and Rodney Strain, which of course we know was not present, and a member of the Clerk of Court's office, which we know -- and the Clerk of Court which we know was not present. Would you agree? But some member of those offices must have been present?

BY MR. GARDNER:

Judge, I am going to lodge an objection here. We are asking this Detective to comment on an item that speaks for itself and that he had no knowledge of the preparation of, he wasn't there and he already testified he wasn't there.

BY MR. ALFORD:

I agree with that objection, Your Honor. I think Counsel is correct about that. The record speaks for itself.

EXAMINATION RESUMED BY MR. ALFORD:

Q. Now, Detective Hall, you and I had what I would like to say a friendly confrontation, I

don't think -- we didn't swing at each other on the night of the tenth?

A. No, sir.

Q. We fussed a little bit. I fussed

anyway, didn't I?

A. You seemed to be emotionally charged, but I remained calm and pleasant and professional, sir.

Q. And the reason for that was, and I was telling you -- that was at the jail, I mean not at the jail, that was at the Sheriff's office?

A. Yes, sir.

Q. And my recollection is that it was around 6:00 or 7:00 o'clock on the night of the 10th; is that your recollection? Maybe you made a note of it. I didn't?

A. It was in the early evening hours. Yes, sir.

Q. It was the early evening hours?

A. Yes, sir.

Q. And I told you at the time that he had been appointed an attorney and that you were not to talk to him; is that right?

A. Words to that effect. Yes, sir. That you had been appointed his counsel. I said okay. Yes, sir.

Q. And that would have been in the early evening hours. Actually, I called you from the jail, did I not, or someone from the jail called you and said his lawyer is here looking for him?

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A. I received a communication you were at the law enforcement complex, or Mr. Alford was in the law enforcement complex looking for me.

Q. Looking for his client?

A. I said okay. So, this was after we returned him back to the jail from, if I may use the word, afternoon out, road trip, ride in the car, and I returned him to the lock-up and we received that communication as we were coming into the sally-port. So, we got him back in the facility and drove straight across the street where I met you.

Q. So, I guess we must have crossed paths because I think you're correct, I did not see him when I saw you over at the Sheriff's complex?

A. No, sir. I received information you were there waiting for me, sir, and I drove straight there to meet you.

Q. I was driving to find you?

A. It is conceivable. Yes, sir.

Q. All right.

A. There was nothing laid out to deceived you sir. When I got the information you were waiting for me, we were in the sally-port bringing him back into the facility. I secured him in the facility and went straight across the street to see you, sir.

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Q. Right. In doing the rights form, and I think we stipulated to something last time, the last time you testified you were saying that these events occurred on the 9th, but I think we have now --

A. The actual trip was on the 10th. Yes, sir.

Q. What?

A. The actual road trip was on the 10th.

Q. That's clear. You agree with that?

A. Yes, sir.

Q. That it was on the 10th. And if you testified previously it was on the 9th, it was just an error?

A. Human error.

Q. I understand. Detective Hall, are you aware of the video facilities that your department has?

A. Now or then, sir?

Q. Then. In September?

A. Yes. I asked that because I know that the equipment has been worked on. It has been changed and some of the technological aspects have been worked out at different times. That's why I ask you between then and now, sir.

Q. Okay. Well --

A. At that time, yes, sir. I was aware somewhat of the video equipment.

Q. When you first came in contact with Mr. Montejo was it on September 6th?

A. There abouts. Yes, sir.

Q. Or the 7th?

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A. Sixty or the 7th, previous to him being brought in the jail.

Q. Your last contact with him was on the 10th?

A. Yes, sir.

Q. We are talking about the video capabilities of the Sheriff's office during that period of time?

A. Yes, sir.

Q. Were you aware of the video capabilities?

A. The system, yes, sir.

Q. All right. And were you present when Detective Major and Detective Morse were questioning Mr. Montejo in the early part of the investigation?

A. Can you qualify the word present? Was I in the room with them or outside of the room?

Q. Or were you watching it on a monitor?

A. Yes, sir. I was in and out of a monitoring room from a different part of the building.

Q. Who was controlling that monitor? Physically?

A. It would have probably been one of the commanding officers, the Captain or the Major or one of the Lieutenants. I'm not real sure, sir.

Q. I mean are you aware that the video cuts off after he asks for a lawyer?

A. Yes. I saw that earlier on the tape.

Q. You're aware of that?

A. Yes.
Q. Are you aware that the video does not show dates and times?

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A. I would have to look at it, but I am not sure if it does, sir. I don't know.
Q. You don't know if it does?
A. That particular tape, no, sir. I don't know if it does or not.
Q. Well, it wouldn't be the tape it would be the machine that would show the date and time, I guess. Wouldn't it? On the tape?
A. I'm not sure the technical aspects. I know some of the digital tapes, I think the date is imposed, but I don't know about V.H.S. tapes.
Q. If someone -- I mean, is it like standard operating procedure that if you're questioning someone and they ask for a lawyer that you cut the tape off?
A. It is not a qualifying, like a documented procedure, but you terminate the interview. At what point the tape goes

off, I have no control over that.

Q. I didn't say you did, but I was asking you if you know?

A. The procedure, sir, I would have no control or knowledge of procedure of when a tape is in fact turned off.

Q. Okay?

A. That would be, I guess, the judgment call of whoever is monitoring the equipment.

Q. So, that would be Major Oswald and Captain Hall?

A. Quite possibly. Yes, sir.

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Q. That's where the monitor is, in the Major's office; is that right?

A. That was in the Major's office. Not just anybody could go in and access it. It was in the Major's office.

Q. So, whoever was in the Major's office was controlling when that tape was on and when it was off?

A. I would suppose so, sir. Yes, sir.

Q. Do you know who that was at that time that was in there?

A. Specifically, no, sir.

Q. Is there anything on the tapes that would show?

BY MR. GRACIANETTE:

Mr. Alford, that is just a copy.

BY MR. ALFORD:

I was just looking to see who initialed the tape.

BY MR. GRACIANETTE:

That's just a copy that I made.

EXAMINATION RESUMED BY MR. ALFORD:

Q. Do you recall whether or not you initialed any tapes for future identification?

A. I might have, sir. I don't recall doing it though.

Q. You don't know if you did or didn't?

A. I handle a lot of cases. I don't recall if I did or not.

Q. Would you mark it in your report if you identified pieces of evidence?

A. Items that I submit I mark on the evidence tape. I mark it on the tape, my own initials. Yes, sir.

Q. But it is your recollection then I take it, that you didn't do the taping and so it wouldn't be you that would have marked the tapes?

A. Not that I recall. I didn't handle any tapes in this case.

BY MR. ALFORD:

No further questions, Your Honor. Thank you, Detective.

CROSS-EXAMINATION

EXAMINATION BY MR. GARDNER:

Q. With regard to your contact with Mr. Alford on the 10th, in the evening hours, was that after you had gone with Detective Galloway, as well as with the defendant, to visit where it was the gun had been thrown?

A. Yes, sir.

Q. When Mr. Alford indicated to you he represented the defendant after that trip took place, was that the first knowledge you had that the defendant had been appointed counsel?

A. Yes, sir.

Q. At any time during your conversations with the defendant on the 10th, did he indicate he had been appointed counsel?

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A. No, sir, because I specifically asked him that before we left, have you been contacted by counsel, did your family contact an attorney. He said no, I haven't heard from anybody, nobody at all.

Q. Therefore, you made -- with regard to any other contact that you had with the defendant on September 9th, clearly he did not, or at any time during that day on the 9th, did he make any statements to you that he had an attorney, or that he had been to court?

A. No, sir. None whatsoever.

BY MR. GARDNER:

Nothing further. Thank you.

BY THE COURT:

Re-direct?

BY MR. ALFORD:

No re-direct, Your Honor.

BY THE COURT:

Thank you. You may step down.

Any other witnesses?

BY MR. ALFORD:
Your Honor, we obviously don't have any other witnesses today and we obviously do not want to continue this hearing, but we find out that none of the witnesses that we thought would be, would have been running the tape are present. And may all of us approach the bench, please?

BY THE COURT:
Well, I guess what we need to do, does the state have any witnesses?
BY MR. GRACIANETTE:
No, sir.
BY THE COURT:
All right. Approach the bench.

(Bench conference held)

BY THE COURT:
Where are we.
BY MR. ALFORD:
Your Honor, Mr. McNary and I have conferred and we will submit the matter.
BY THE COURT:
All right. Thank you. The Court is

going to take a brief recess so I can collect my thoughts and I will be back momentarily.

(Recess taken)

BY THE COURT:
Be seated. Do we need any argument? Did you all want to argue or are you ready for the Court to make a ruling?
BY MR. MCNARY:
Your Honor, I will make a brief argument.
BY THE COURT:
Very well. Please do.

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BY MR. MCNARY:
Your Honor, of course the seminal case on this matter is Edwards versus Arizona which essentially says when an accused invokes his Fifth Amendment right to counsel during a custodial interrogation he may not be interrogated further until a lawyer is provided or until he himself initiates further communication with the police. Obviously, the Court, I think the crucial thing the Court has to determine was did he

initiate further communication with the police. That tape says he kind of off-handedly, right after asking for a lawyer says, I don't want a lawyer, after the officers present -- I'm not sure what they communicated to him at that point. The case law does demand the prosecution do more than simply establish the accused responded to further questioning, even if he is again advised of his rights as that wouldn't constitute a valid waiver. Minic (spelled phonetically) versus Mississippi a 1990 U.S. Supreme Court case says you cannot re-interrogate without counsel if the Fifth Amendment right is invoked. I think clearly he invoked his Fifth Amendment right. State versus Ducos (spelled phonetically) 390 So 2nd, 1281 a 1980

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State Supreme Court case, threw out a statement where the police failed to scrupulously honor the accused's request for a lawyer by continuing to interrogate him after he invoked his right to counsel. State -v- Harper and State -v- Tart which are '96, Louisiana Supreme Court cases, indicated that what needs to be looked at is who initiated the subsequent questioning. I think it is clear from that second tape that the police in fact initiated further questioning.

The Court is supposed to look at the time delay between the original request and the subsequent interrogation. I'm not sure what that is in this case. By the officers' best estimates by today's testimony it was somewhere between ten and fifteen (15) minutes.

The Court needs to look at whether Miranda rights were given prior to each interrogation. I think that probably has been shown by that the State that that did in fact occur, but then again other cases say that if the request isn't scrupulously honored even a further Mirandizing doesn't cure the problem.

And the last factor that has to be looked at under Harper and Tart again, 430, 627 and 672 So 2nd 116, is whether pressure was asserted on the accused between the time he invoked his right and later questioned. Of course we don't know that because the tape unfortunately stops when he says he wants to get a lawyer and the second tape begins with them saying okay, now we understand you want to talk to us again, etcetera, etcetera. We don't know what transpired during that time period with any certainty. Some of the officers were in or out, they may or may not have certain conversations. One officer may or may not have been having pizza at the time. We don't know what kind of pressure was asserted on the defendant because it is not on the tape. And for that reason, Your Honor, I thin if there's one thing that is clear it is that the defendant invoked his right to counsel. I don't think that there was any clear waiver or re-initiation of contact after that point and I would ask that any statements he made after that point be suppressed.

Thank you, Your Honor.

BY THE COURT:

Thank you, Mr. McNary.

BY MR. GRACIANETTE:

Judge, I agree with Mr. McNary, that the seminal cases under state laws State versus Harper, 430 So 2nd 627, that's a Louisiana Supreme Court case from 1983 and State versus Tart, Louisiana Supreme Court 1996, 672 So 2nd 116 and those cases

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indicated that there are four or five factors the Court must consider to determine whether or not the request for counsel and then revocation of that request would be valid.

Factors to be considered are, who initiates the subsequent questioning. It is clear from the tape showing the defendant all most upon immediately asking for counsel withdraws that request and wants to continue the conversation.

The time delay between the original request and subsequent interrogation, the testimony by the officers today could be less than ten minutes, could be up to fifteen (15) minutes, but a very short time frame.

Whether Miranda rights were given prior to each interrogation, officers testified they Mirandized the defendant before the interrogation. The video tape shows after he requested an attorney and withdrew that request they again re-Mirandized him on the video tape.

Whether the waiver of rights form is

signed, the record reflects the waiver of rights form is in fact signed by the defendant.

And whether pressure was asserted on the accused between the time he invoked his right and later questioning, testimony of the officers uncontradicted

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said there was no pressure on the defendant and that in fact they went in there to discuss with the defendant his options to make sure he understood what he was doing.

After that conversation and interview they come back in, read the defendant his rights, he gives another taped statement to the police. It is clear the defendant waived all Miranda rights, voluntarily gave a statement to the police, both before and after his request for an attorney and as a result the State would ask this Court to deny the motion to suppress.

BY THE COURT:

Okay. I would like to ask counsel to succinctly state what they feel is the issue before the Court at this particular moment.

Mr. McNary, would you be able to articulate the issue that's before the

Court?

BY MR. MCNARY:

Your Honor, I think the issue is whether or not every statement made by the defendant after he indicated he wished to invoke his right to counsel should be suppressed. I think the only way that the statement should not be suppressed under the case law would be that if he himself initiated further contact with the police.

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Your Honor, the time sequence there is a couple of seconds, after some hub-bub and some shouting and saying, okay, then you're going to be charged with first degree murder, and clearly that was not what was told to him, that he was going to be charged with before that and that came as a shock to him, and at the very end of the tape he says, well then, I don't want a lawyer. I don't know that that qualifies as scrupulously observing his right to counsel.

I think scrupulously observing someone's right to counsel when they request counsel is to go get them counsel, not to continue to re-interrogate them shortly thereafter.

I think that succinctly as I can put it, Your Honor, is the issue.

BY THE COURT:

Okay. Mr. Gracianette or Mr. Gardner?

BY MR. GRACIANETTE:

Whether or not the defendant adequately waived his Miranda rights and waived his request for counsel is demonstrated by the tape, Judge. I think as soon as the officers told the defendant that he was being charged with first degree murder and began walking out of the room he said no, come back, come back. He said it a couple of times indicating he

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wanted to talk to those officers again. As result of that that led to further discussions initiated by the defendant which led to his subsequent confession.

BY THE COURT:

Well, let me ask then, Counsel, if I fully understand the issues before the Court. It seemed that this hearing on a motion to suppress commenced about three hearings ago. After the first hearing we took evidence, after the second hearing we left it open for this third hearing here today. It appeared to me as I was listening to the testimony and recounting the testimony from the second, from the first or second hearing, that we had a two-prong issue, namely, should the statement of the defendant that was video taped in Slidell, should that be suppress, and secondly, should any statement or information obtained by Detective Jerry Hall on September 10th, be suppressed. Isn't that what is before the Court, gentlemen?

BY MR. ALFORD:

Yes, sir.

BY MR. GRACIANETTE:

That's correct, Your Honor.

BY THE COURT:

So, it's a two-prong issue and I understand all of the legal argument that's been advanced by the lawyers, but I

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just wanted to at least confirm that that is in fact the two issues that are before the Court.

That being the case, the Court is now ready to rule and will dictate into the record its findings and reasons for judgment. As indicated previously by the Court, the first issue to be decided is whether or not the taped, video tape of the defendant made at the Slidell Sheriff's office, correct me if that's incorrect. It was at the Slidell Sheriff's office, I believe, wasn't it?

BY MR. GRACIANETTE:

Yes, sir.

BY THE COURT:

Should be suppressed. I have listened very carefully to the testimony of the officers in all three of these hearings. I have observed the tape and based upon the evidence the Court is called upon to make a decision. The interrogation and the tape of that interrogation that occurred some where around September 6th or 7th, I cannot recall the specific date, or there abouts, the defendant during the course of that questioning invoked his right to counsel. Where upon the three officers in the interrogation room stood up and said something to the effect, well, that's it.

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We are going to conclude it and walked out. The defendant said something to the effect, your good guys, one of the officers said, we are going to book you with first degree murder and the defendant then made some remarks to the effect, wait a minute, come back.

In determining this issue the Court must look at the totality of the circumstances. It has been advanced by I believe both the defense as well as the State that the factors that you would consider are who initiates the subsequent questioning, the time delay between the original request and the subsequent interrogation, whether Miranda warnings were given prior to each interrogation, and whether a waiver of rights form was signed and whether pressure was asserted on the accused by the police between the time he invoked his right for an attorney and the later questioning.

The Court will deal with those factors as follows:

It is apparent from the testimony and tape that the defendant initiated the subsequent questioning. Detective Morse, I believe that's the correct Detective's name, stated that as they were leaving the room, the defendant said, wait a minute, I don't want a lawyer or something to that effect. That is apparent on the tape.

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The time delay between the original request and subsequent interrogation, Officer Major has testified that it was ten minutes between the initial request for a lawyer and when they went back in and started again questioning the defendant. They went back in, the tape as its continued from the interval which it was not playing was approximately ten minutes based on Officer Major's testimony. Officer Morse testified initially that it was ten minutes or less, then subsequently in his testimony said well, maybe ten to fifteen (15) minutes. The Court does not find that delay to be unreasonable or inordinate and finds that the delay wasn't so long that the defendant was not aware of his earlier statement. The Court finds that to be appropriate. The time delay was not unreasonable. Whether the Miranda warnings were given prior to each interrogation, the Court again based on testimony and the tape clearly shows that Miranda warnings were again given to this defendant and that he did sign the rights form. It is interesting to note or the Court notes that in the second commencement of the interrogation and the tape, the rights were again given to this defendant, he had every opportunity to

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say, you know, I'm not going to talk to you guys, get the hell out of my sight. I want a lawyer right here. That was not done. He continued to give a statement. He continued to give an inculpatory statement. The next issue is whether undue pressure was asserted on the defendant by the police by the time he invoked his right to counsel and the later questioning. The Court is impressed with Officer Morse's testimony. The Court finds that there is no undue pressure being asserted. By observing the first taped segment and the second taped segment it is apparent that no duress or force was exerted upon this defendant. You can observe the actual totality of those tapes and come to that conclusion. As a consequence of the Court's findings, the Court determines that the statement given on the date which I have been discussing here, namely September 6th or 7th, or there abouts, the motion to suppress that is denied. The Court next addresses the issue that it itemized, namely what about the action of Detective Jerry Hall and others on September 10th, when the defendant said I want to show you where I threw the gun in Lake Pontchartrain. The issue there before the Court is this defendant had

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appeared before a magistrate for purposes of 72-hour hearing and as is customary, the defendant was appointed an attorney in the form of the Public Defender's Office. What effect does that appointment have upon any subsequent conversations between the Sheriff's department and this defendant. It is the defendant's contention that all officers of the Sheriff's department had constructive notice of the appointment of the Public Defender as being the attorney for this defendant. Not withstanding this appointment the defendant chose to again make inculpatory statements to the Detectives. The Court looks to the jurisprudence not only of Louisiana but as handed down by the United States Supreme Court and this Court relies upon the decision of Moran versus Burbine which as Judge Ginger Berrigan sets forth in her treatise, Louisiana Criminal Trial Practice, states that the Burbine case narrowly construed the defendant's Miranda rights by holding that only the accused himself can invoke the right to an attorney not withstanding deceptive tactics by the arresting officers. In the Burbine case after he had been arrested, but before he made a statement, his sister contacted the Public Defender's office to get legal assistance

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for Burbine. In that case the Assistant Public Defender called the police station and advised the arresting officer directly that she would be acting as his attorney if they desired to question him. The officer assured her there would be no questioning of Burbine until the next day. Not withstanding those assurances they did question Burbine without telling him about the contact with the Assistant Public Defender. There the facts seem pretty strong. The Supreme Court found that the arrested subject had voluntarily waived his Miranda rights because events occurring outside of his presence which are entirely unknown to him have no bearing on his capacity to understand and knowingly give up a constitutional right. In essence, this Court finds that the fact an attorney is appointed in a 72-hour hearing does not tacitly convey to all of the force a defendant has an attorney or if he does have an attorney it certainly doesn't prevent that defendant from exercising his own constitutional rights and giving up those rights.

So, as a consequence, the Court's finding in this second issue the Court denies the motion to suppress any statements or inculpatory evidence that might have been received as result of the

September 10, 2002 encounter with Officer Jerry Hall and this defendant.

That's the ruling of the Court.

BY MR. GRACIANETTE:

Judge, may we ask for some more clarifications.

BY THE COURT:

Surely.

BY MR. GRACIANETTE:

There was also a video tape statement taken by Detective Hall on September 7, 2002 prior to the appointment of counsel. Detective Hall testified he properly administered Miranda rights. We neglected to mention that.

BY THE COURT:

Well, that's a third issue. I named two you all snuck another one in on me, but you didn't really sneak it in on me, you're right, that was a third time. The Court is convinced that Mr. Montejo was adequately Mirandized not withstanding that he chose to give a statement to officer Jerry Hall on that date. The Court finds that statement shall not be suppressed.

BY MR. GRACIANETTE:

Thank you, Judge. Finally, we also forgot this issue, there was testimony regarding search warrants made on Mr. Montejo. If I can look at the documentation.

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BY THE COURT:

Well, that's why the Court loves piece-meal motions to suppress because we sometimes overlook issues. But, I think that does seem correct, Mr. Gracianette. The Court finds there was probable cause for the issuance of the search warrant and does not elect to suppress the search warrant or the return or findings there of.

BY MR. GRACIANETTE:

Thank you, Judge.

BY MR. MCNARY:

Your Honor, please note the defense's objection to the Court's four rulings.

BY THE COURT:

Thank you gentlemen.

BY MR. GRACIANETTE:

We would like to set this matter for a trial date. We have a July date and a September date.

BY MR. ALFORD:

We have already got a case in July.

BY MR. GARDNER:

September. Let's just keep it on the September docket.

BY THE COURT:

Set it for trial in September. Court is at recess until 1:30 tomorrow afternoon.

TWENTY-SECOND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA

STATE OF LOUISIANA
VERSUS NUMBER: 355706
JESSE JAY MONTEJO

* *

VOLUME VI

TRANSCRIPT OF PROCEEDINGS taken before the Honorable Donald M. Fendlason, Judge Presiding, Division "H", Twenty-Second Judicial District Court, Parish Of St. Tammany, State Louisiana, on March 5, 2005, in Covington, Louisiana.

APPEARANCES:

RONNIE GRACIANETTE, ESQ.
(ASSISTANT DISTRICT ATTORNEY)

SCOTT GARDNER, ESQ.
(ASSISTANT DISTRICT ATTORNEY)

JAMES WILLIAMS, II, ESQ.
(ATTORNEY FOR JESSE MONTEJO)

* * * *

OPENING STATEMENT BY MR. GARDNER

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* * * *

And most importantly, on the way back in, I'm so sorry

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The defendant executes, and asks, Can I have a pen and some paper, I want to write a letter, I want to write a letter to this lady and tell her I'm sorry, I am so sorry. And the defendant proceeds in his own handwriting to write a heartfelt letter describing how it was all an accident, it shouldn't have happened this way and he feels sorry.

* * * *

TWENTY-SECOND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA

THE STATE OF LOUISIANA	
VERSUS	NUMBER: 355706
JESSE JAY MONTEJO	

* *

VOLUME VII

TRANSCRIPT OF THE PROCEEDINGS taken before the Honorable Donald M. Fendlason, Judge Presiding, Division "H", Twenty-Second Judicial District Court, Parish of St. Tammany, State of Louisiana, on March 6, 2005, in Covington, Louisiana.

APPEARANCES:

RONNIE GRACIANETTE, ESQ.
(ASSISTANT DISTRICT ATTORNEY)

SCOTT GARDNER, ESQ.
(ASSISTANT DISTRICT ATTORNEY)

JAMES WILLIAMS, II, ESQ.
(ATTORNEY FOR JESSE JAY MONTEJO)

* * * *

CROSS EXAMINATION OF WADE MAJOR BY MR. WILLIAMS

Page 1270

A. Yes, sir, I did. The only other thing that I was involved in is, I, with Detective Juge, Bobby Juge, took Mr. Montejo to the Highway 11 bridge, because he wanted to show us the approximate location that he threw the weapon into Lake Pontchartrain.

* * * *

TWENTY-SECOND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA

THE STATE OF LOUISIANA
VERSUS NUMBER: 355706
JESSE JAY MONTEJO

* *

VOLUME VIII

TRANSCRIPT OF THE PROCEEDINGS taken before the Honorable Donald M. Fendlason, Judge Presiding, Division "H", Twenty-Second Judicial District Court, Parish of St. Tammany, State of Louisiana, on March 7, 2005, in Covington, Louisiana.

APPEARANCES:

RONNIE GRACIANETTE, ESQ.
(ASSISTANT DISTRICT ATTORNEY)

SCOTT GARDNER, ESQ.
(ASSISTANT DISTRICT ATTORNEY)

JAMES C. WILLIAMS, JR., ESQ.
(ATTORNEY FOR JESSE MONTEJO)

* * * *

CROSS EXAMINATION OF JOHNNY MORRIS BY MR. WILLIAMS

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Q. We now know, Detective Morris, that approximately 8:30 in the morning of September 10th, 2002, he went to a seventy-two hour hearing in the presence of an attorney and in the presence of the representative of the Sheriff's Office and he was appointed counsel, in the morning of September the 10th. You are aware of that?
A. I am now.
Q. But you sent a team to pull him out of the jail when he had a lawyer, without speaking to that attorney; isn't that true?
A. Well, I was unaware of that at the time.

* * * *

TWENTY-SECOND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA

THE STATE OF LOUISIANA
VERSUS NUMBER: 355706
JESSE JAY MONTEJO

* *

VOLUME VIIII

TRANSCRIPT OF PROCEEDINGS taken before the Honorable Donald M. Fendlason, Judge Presiding, Division "H", Twenty-Second Judicial District Court, Parish of St. Tammany, State of Louisiana, on March 8, 2005, in Covington, Louisiana.

APPEARANCES:

RONNIE GRACIANETTE, ESQ.
(ASSISTANT DISTRICT ATTORNEY)

SCOTT GARDNER, ESQ.
(ASSISTANT DISTRICT ATTORNEY)

JAMES C. WILLIAMS, JR., ESQ.
(ATTORNEY FOR JESSE MONTEJO)

* * * *

DIRECT EXAMINATION OF JERRY HALL BY MR. GRACIANETTE

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* * * *

Q. I am going to direct your attention to September 9th and September 10th of 2002. Did the dive team from the St. Tammany Parish Sheriffs Office attempt to locate the weapon in the location where it was described by Mr. Montejo to the officers, off of Highway 11?

A. Yes. As a continuing of the investigation, developing evidence, the dive team was directed to the lake. And, in fact, we had several divers in the water for a couple of days, searching a grid pattern in the lake bottom itself off the Highway 11 bridge.

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Q. Were they able to find any evidence or recover any items from the area described by Mr. Montejo as where he placed the gun?

A. No, they did not.

Q. As a result of that, did you have occasion to go see Mr. Montejo on September 10th, 2002, for purposes of doing follow up regarding the location of the weapon?

A. Yes.

Q. I am going to show you three forms.

BY MR. GRACIANETTE:

May I approach?

BY THE COURT:

Yes, sir.

EXAMINATION BY MR. GRACIANETTE:

Q. Now, officer, are you perfect?

A. No, sir.

Q. Have you ever made mistakes before in your entire life?

A. Yes, I have.

Q. I am going to show you what is marked as State's Exhibit Number 67. Do you recognize that document as well as 68 and 69?

A. Yes.

Q. Please describe those three documents to me, please?

A. On the morning of the, what is dated the 9th, I went to visit Mr. Montejo at the correctional center, had a very brief interview with him, concerning his well-being, was he being attended to, and I returned back to investigation, did not press him at all on the investigation.

BY MR. WILLIAMS:

Your Honor, I am having a hard time hearing Detective Hall.

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BY THE WITNESS:

I am sorry. I am sorry, counselor.

BY MR. WILLIAMS:

I didn't hear anything he said about 8:45 in the morning.

BY THE WITNESS:

okay. If I may, I will start over again, please?

EXAMINATION BY MR. GRACIANETTE:

Q. Yes, please.

A. I went that morning to visit him at the jail, and just at the direction of a supervisor to check on him, to see what his status was in our correctional facility. So in order to be correct, before I even asked him how he was doing, I give him the rights form. It is the same form he was given in our interviews. Of course, it is dated and signed by Mr. Montejo. Subsequent to that --

Q. Who dated the form, by the way?

A. I did, sir.

Q. Okay. Was that date correct on that form?

A. Not -- numerically correct, but immorally correct. It is dated the ninth. It was actually tenth. I wrote the wrong date on the document.

Q. Okay. Did you do that on any of the other documents in front of you?

A. Yes. The one of where we -- I signed him out later that afternoon, I went back and talked to him, again gave him a rights form that afternoon, and again it is dated the ninth but it was actually the tenth. The investigation was evolving back from the sixth, it's a continuum of information. And then, of course, the actual -- the one dated the tenth is when we were on the south shore in

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Gretna, Louisiana, and we gave him his rights again, to make sure that he understood what was going on.

Q. So just so I can be clear. State's Exhibit Number 67 and 68 are both dated September 9, 2002?

A. Yes.

Q. And they should be dated September 10th?

A. Yes. Because if, it was discovered, when it was discovered, I actually went to the radio logs, they keep track of our radio activity, and it was actually dated 9/10 of when I had him in my company going to continue the investigation, not that I wrote the wrong date.

Q. Officer, why did you read him his rights again in State's Exhibit Number 68 at 2:45 p.m.?

A. That was in the afternoon when we were preparing to leave the correctional facility.

Q. Why were you taking him from the correctional facility?

A. To further the investigation, to attempt to locate the weapon in the lake, because we had people in the water, had been for a couple of days.

Q. Okay. Did you bring him to the actual location on Highway 11 bridge where the officers were looking for the gun?

A. Yes, we did. He accompanied myself and another detective.

Q. Did he show you anything regarding where the gun was?

A. Just the approximate location as he indicated in the interview. Some yellow tape had been put on the bridge earlier, and he said, this area or maybe further up, maybe further back, I am sure this is the area here, and the boats were in the water, we were communicating over the - on the radio with the detectives in the water.

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Q. Now, I am referring you to State's Exhibit Number 68. Is that essentially the same rights form on a different paper, but essentially the same rights being read to the defendant?
A. It is the exact same, same working.
Q. I will take you through this quickly.
A. Uh-huh. (Affirmative response).
Q. Did you read all of those rights to him?
A. Again, yes, sir.
Q. Did he seem to understand those rights?
A. Yes, he did.
Q. Did he ask any questions?
A. No, sir. Not concerning his rights, no.
Q. Did he ask for the presence of a lawyer?
A. No.

* * * *

DIRECT EXAMINATION OF JERRY HALL BY MR. GRACIANETTE

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* * * *

A. This is a, a note that Mr. Montejo had written, in my presence and witnessed by my partner at that time, Detective Galloway, and Mr. Montejo printed and signed his name on it.

Q. And without reading the entire note, generally what does the note consist of?

A. He references to having voluntarily showed us the gas station and, of course, off of the West Bank Expressway, to where he threw away the bag, keys and gloves.

Q. Is that done in his own handwriting?

A. Yes, it was.

Q. Any promises, threats, coercion or intimidation levied against him to have him -- force him to write that note?

A. No. And he references that I was not physically forced to do this in any way.

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Q. And during the ride back, did Mr. Montejo again ask for any writing utensil or document so that he could write something out?

A. He did.

Q. What specifically did he ask for?

A. He asked for a pad.

Q. And what else?

A. A pen.

Q. Did he say why?

A. He said he wanted to write something.

Q. I'll show you what is marked as State's Exhibit Number 76, which I have previously shown to the defense counsel. Can you identify this for me?

A. Yes, I can.

Q. What is that, sir?

A. It's a letter that is signed 9/10 '02, approximately 8:30 p.m., signed by Jesse, Mr. Jesse Montejo and it's addressed to Ms. Ferrari.

* * * *

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DIRECT EXAMINATION OF JERRY HALL BY MR. GRACIANETTE

* * * *

Q. Any promises, threats, force, intimidation or any coercion levied against him in obtaining that particular statement?

A. No, sir, none whatsoever.

* * * *

Q. At any time during the day when you were with Mr. Montejo, leading up to where you have brought him back to the jail, did he ever mention anything about a lawyer?

A. Only when I asked him if he had one, he told me no. I asked him if he had been contacted by anyone in his family concerning an attorney and he told me no.

Q. What happened when you arrived back at the jail?

A. I had received communication from my radio room by the time we got back that pagers were going off and the cell phones were going off and we were being directed to go back to the investigation's bureau to meet with a public defender.

Q. And when you arrived at the bureau, who did you meet with?

A. A gentleman, I believe, Bill Alford, from our public defender's office.

Q. And what was the nature of that conversation?

A. He was pretty upset in that I had been out with

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Mr. Montejo that afternoon, and he started getting on me pretty intently about having been retained as his counsel. And I replied in kind, I said, I was not aware of that. I said no one notified me. Maybe you all could have notified Mr. Montejo, too, because he didn't say he had a lawyer. And some other words were exchanged. And I said, Well, there will be no other contact without your permission now that I have been duly notified that you have been retained as counsel.

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CROSS EXAMINATION OF JERRY HALL BY MR. WILLIAMS

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Q. -- of guilty or not guilty. A seventy-two hour hearing. I not going to argue with you any more. But you learned, did you not, that he had been appointed Bill Alford, the Indigent Defender Board attorney for capital cases, as his attorney that morning, correct?

A. I found that out on the evening of the tenth.

Q. Bill Alford told you that himself, didn't he?

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A. Yes, he did.

Q. He wasn't too happy about you having a client who was represented by counsel getting pulled out, driving to Jefferson Parish, and signing confessions and apologies and statements?

A. He was upset over the fact that it occurred, but then, there again, Mr. Montejo, by his own words, never knew he had a lawyer.

Q. And that's your word, is it not? Didn't he ask you, he said, I thought I had a lawyer, and you told the ladies and gentlemen of the jury, you asked him, do you have a lawyer now?

A. Say that again, sir.

Q. Did you not tell the ladies and gentlemen of the jury that you asked him on the tenth did he have a lawyer?

A. Had he retained counsel or had contacted a lawyer, anyone from his family contacted him.

Q. And then it is your testimony that he told you, no, I don't have a lawyer, let's go talk some more?

A. He told me he did not have an attorney.

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REDIRECT EXAMINATION OF JERRY HALL BY MR. GRACIANETTE

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* * * *

Q. -- let me show you that paper, the apology letter. We will call it an "apology letter" for purposes of this discussion. Did you also tell him, I promise you I didn't cold-blooded kill him, Mr. Lou, did you tell him to write that in his statement?

A. I didn't tell the man to write anything, sir.

Q. Did you tell him to write in his statement, forgive me, Mrs. Ferrari?

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A. No, sir.

Q. Did you tell him to say, I need your forgiveness, Mrs. Ferrari, I am more sorry for what happened, please forgive me? Did you say put that in your letter, Mr. Montejo, make sure you write that in your letter?

A. No, counselor, I did not.

Q. Where were you when that letter was wrote -- written?

A. I was physically driving an automobile on the

Causeway, heading to the north shore.

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DIRECT EXAMINATION OF JESSE MONTEJO BY MR. WILLIAMS

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* * * *

BY MR. WILLIAMS:

At this time, the defense calls Jesse Montejo.

(JESSE JAY MONTEJO, AFTER HAVING BEEN FIRST DULY SWORN UNDER OATH, DID TESTIFY AS FOLLOWS:)

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q. Mr. Montejo, would you introduce yourself to the ladies and gentlemen of the jury.

A. My name is Jesse Montejo, Jesse Jay Montejo.

Q. I need you to speak so everybody can hear you. Mr. Montejo, how old are you, sir?

A. Twenty-five.

Q. Where were you born?

A. Jefferson Parish.

Q. And who are your mother and father?

A. Brenda Hahncar (sp) and Steve Montejo, over there.

Q. You are going to have to keep your voice up so everybody can hear you.

A. Brenda Hahncar and Steven Montejo.
Q. And where did you grow up?
A. On the West Bank in Gretna.
Q. All right. Mr. Montejo, I want to direct your attention to your teenage years. Did you have the occasion to spend time in Florida?
A. Yes, sir. I moved to Florida when I was sixteen.
Q. And who did you live with in Florida?
A. My mother.
Q. Where did you all live in Florida?

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A. We lived in Dade City in Shepherd Hills.
Q. Where is that?
A. That is Pascal County.
Q. That's north of Tampa?
A. Yes, sir.
Q. Now, Mr. Montejo, I want to direct your attention to 1996, and ask you if in 1996 you were charged with several crimes? And I am going to go through them with you. Okay?
A. Yes, sir.
Q. Do you recall pleading guilty to all of these crimes on January 21 of 1997 and receiving a six year sentence for all of the crimes that was run concurrent?
A. Yes, sir.

Q. You pleaded guilty to the following crimes: In case 963783, to theft and burglary?
A. Yes, sir.
Q. Case 962944, to armed burglary and criminal mischief?
A. Yes, sir.
Q. Case 962945, burglary and petty theft?
A. Yes, sir.
Q. Case 962723, burglary and grand theft?
A. Yes, sir.
Q. Case 962946, armed burglary, burglary, grand theft and grand theft?
A. Yes, sir.
Q. Case 963343, armed burglary?
A. Yes, sir.
Q. Case 963342, burglary and petty theft?
A. Yes, sir.
Q. Case 963226, armed burglary and theft?
A. Yes, sir.
Q. Case 963227, burglary and grand theft?

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A. Yes, sir.
Q. Case 963228, burglary and grand theft?
A. Yes, sir.
Q. Case 963341, armed burglary and grand theft?
A. Yes, sir.
Q. Case 962344, burglary and grand theft?
A. Yes, sir.
Q. Case 960294, armed burglary and another

count of burglary?

A. Yes, sir.

Q. You pleaded guilty to all of those on, on January 27th of 1997, all at the same time?

A. Yes, sir.

Q. And for your record -- never mind. And you received concurrent six year and five year sentences on all of these charges?

A. Correct.

Q. Which the judge ran them all together?

A. Correct.

Q. And at the time you pleaded guilty, you were seventeen years old; is that correct?

A. Yes, sir.

Q. And you served the six year sentence; is that correct?

A. Yes, sir.

Q. When you were released from Florida, where did you go?

A. Straight back to Louisiana, where I moved in a house with my dad in Slidell.

Q. And where was that in Slidell?

A. DeSoto Street.

Q. Okay. Now, did you get a job after you got back to

Louisiana?
A. Instantly, yes, sir.
Q. Where did you get a job?
A. A job at Tire Town.
Q. Where is that?
A. Off Old Spanish Trail.
Q. What did you do when you were working at Tire Town?
A. Changing tires and rims, stripping tires off rims and changing them.
Q. How long did you work at that job?
A. About three weeks.
Q. All right. After that job, did you get another job?
A. Yes, sir.
Q. What did you do then?
A. I began doing roofing and remodeling in New Orleans.
Q. Who were you working for?
A. I was working for five different individuals who were self-employed, which I met through friends.
Q. What kind of work did you do?
A. I actually did shingling and felting and painting and tearing stuff down inside of houses.
Q. What kind of money were you making doing that?
A. Twelve dollars an hour, sir.
Q. Was that steady work?

A. Yes, sir.

Q. Now, around that time, toward the end of July, early August of 2002, did you meet a person by the name of Jerry Moore?

A. Yes, sir.

Q. How did you meet Jerry Moore? Tell the ladies and gentlemen of the jury.

A. I met Jerry Moore hitchhiking on the interstate,

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headed to the West Bank.

Q. Okay. Do you remember any special circumstances that surrounded that, you just gave a hitchhiker a ride?

A. Well, I picked him up, and at that time I asked him what was he doing hitchhiking, walking, he said he got his van took 'cause he couldn't drive, he had too many tickets. At which time, he told me he was looking for someone to drive him around, so he could get to his job, and he would pay them around sixty to seventy dollars a day, pay for all the gas, sometimes more, depending on how long he works in the day.

Q. Now, did you decide to take him up on that?

A. Yes, sir.

Q. Where did -- that initial time when you met him hitchhiking, do you remember where you took him?

A. To the West Bank.

Q. Did he live on the West Bank?

A. Yes, sir.

Q. What were you doing on the West Bank?

A. I had my grandmother lives on the West Bank.

Q. Now, when was the next time you saw Jerry Moore?

A. The following day he called me.

Q. Okay. So you gave him your number?

A. Yes, sir.

Q. And did you, did Jerry Moore tell you what he did for a living?

A. He said he repaired the dry cleaning machines at dry cleaners for several different people's companies and he got paid forty dollars an hour.

Q. Okay. And did there come a time when you began driving him to and from his jobs?

A. Yes, sir.

Q. All right. And did he, did he pay you for driving him around?
A. Yes, sir, he did.
Q. All right. And did you learn what dry cleaners that he worked for?
A. Yes, sir, several dry cleaners in Mandeville, Covington, Slidell, Hammond, West Bank. He worked for several people, a lot of places.
Q. What kind of money did he pay you?
A. He paid me sixty. At first he started off sixty, seventy dollars a day. Then he started going up a little more, seventy, eighty. Sometimes he would give me a hundred.
Q. And would you be driving him around all day?
A. No, it depends on how long I drive him around is how much money he gives me.
Q. Were you able to drive him around and do your job working on houses?
A. No, sir.
Q. So which did you give up?
A. I gave up the roofing and remodeling.
Q. Now, were you driving him around on a daily basis, or

just on weekdays, or how did that go?

A. On a daily basis.

Q. And he was, he was working steadily; is that correct?

A. Yes, sir.

Q. Now, who did he do most of his work for?

A. He did most of his work for Lewis, Lewis Ferrari, and, I don't know his last name but another one named Grant.

Q. Did there come a time when you met Lou Ferrari?

A. Yes, sir.

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Q. Would you tell the ladies and gentlemen of the jury how that occurred?

A. Well, first, I ran across Lewis Ferrari at his dry cleaners, at Corporate Cleaners right here in Covington, quite a few times, which we negotiated a couple of conversations, but I never really talked to him about any job in particular, other than Friday, which was the Friday before he was killed.

Q. Okay. Now, did you ever -- did you have a cell phone?

A. Yes, sir.

Q. Do you know what the number of your cell phone was?

A. Yes, sir.

Q. What is that?

A. 858-6712.

Q. And do you, do you recall having conversations with Mr. Ferrari?

A. Yes, sir.

Q. All right. And on your cell phone?

A. Yes, sir.

Q. Would you tell the jury about that?

A. He would just call and ask about Jerry and see if he needed -- tell me where to bring him to work, see if he needed some money, so he could get him to come to work, so I would relate the messages to Jerry, because Jerry couldn't talk to him on my cell phone 'cause he was deaf.

Q. Do you have a problem with your hearing?

A. In my right ear.

Q. And did there come a time when, when you met with Lou Ferrari?

A. Yes, sir.

Q. Okay. Do you remember what the circumstances were that surrounded that?

A. Yes, sir. Jerry had called me and asked me to pick up some money from Lou, and I asked him, all right, well, where is Lou at, and he said, well, let me call you back and he didn't call me back, instead Lou called me and said to meet him at the dry cleaners on Pontchartrain to get the money for Jerry, and, you know, he wants to talk to me anyway, so.

Q. And did you go -- now, on Pontchartrain, what do you mean by that?

A. On Pontchartrain, I don't remember the name of it, like Vera's Valet or whatever it is, right there on Pontchartrain.

Q. Yes.

A. So I went out there, Pontchartrain, which I had met with Lou. Lou told me, he gave me -- he already had the money, he gave me the forty to bring to Jerry. He told me, he is like, you know, you really need to get away from Jerry, he said, like, you need to stay away from Jerry, because Jerry is trouble, you know he smokes crack, you know, he is just going to get you in trouble. So, you know, it kind of -- so I was, like, all right, well, he's like --

Q. Did you know -- was there anything you knew about Jerry that corroborated what Mr. Ferrari told you, that he would get into trouble?

A. Well, I began to learn several admissions of Jerry about smoking crack, and Jerry's informed me of five burglaries and stuff that he's done.

Q. So, where was it that you had the meeting with Mr. Ferrari?

A. At his dry cleaners on Pontchartrain.

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Q. Okay. And do you remember about what time it was?

A. I couldn't say exactly. It was the morning time. Getting close to twelve, though, but it was still in the a.m. time.

Q. And what else did he tell you besides what you just said?

BY MR. GARDNER:

Objection. Hearsay.

BY THE COURT:

I sustain that.

EXAMINATION BY MR. WILLIAMS:

Q. All right. Now, did you have the occasion to meet with Mr. Ferrari again?

A. Yes, sir.

Q. When was that?

A. Which was on a Wednesday.

Q. That's the following Wednesday?

A. Yes, sir.

Q. Was that the Wednesday before the Thursday?

A. Yes, sir.

Q. Now, did there come an occasion when you met with Mr. Ferrari and there was another person that was there?

A. Yes, sir. Well, that goes back to that Friday.

Q. Friday. And that was on Pontchartrain?

A. Yes, sir.

Q. Who was the other person that was there?

A. It was an individual who went by the initials of D.P., and he was there with him, and at that time Lou asked me, do you know this individual here, because he lives on the West Bank, close to you. At which time I told him no.

And at which time, he did come up in my van and introduce his self. And he did ask me where was Jerry. Apparently,

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he knew that I was Jerry's independent transportation. So that let's me know that he knew Jerry. And Lou was telling me, you know, you don't need, you don't need Jerry. If you need a job, I could get you a job. He didn't specify what, he just specified for one of his cleaners, that I could get you a job for one of my cleaners. He said D.P. here is currently trying to get work with me, but he has transportation problems. Maybe you all could work out something together instead of Jerry. I said all right. Then he said, Well, maybe we could get together and talk about it next week.

Q. What day was this conversation that you had with him?

A. That was Friday.

Q. This was as a result of him calling you on the phone?

A. Yes, sir.

Q. Would that have been August the 30th?

A. Yes, sir.
Q. All right. Now this person, D.P., would you describe to him to the ladies and gentlemen of the jury?
A. I will give him about the same height as Lewis Ferrari, black male, short, balanced face, and he has the initials of which he goes by on his two forearms, D.P. in Old English letters.
Q. What do you mean his initials?
A. His initials D.P. that he goes by, the two initials that he goes by, D.P., on his forearms.
Q. Were they tattoos?
A. Yes, sir.
Q. Okay. All right. Now, did you continue to drive Jerry around after that?
A. Yes, sir.
Q. Did Jerry continue to pay you?

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A. Yes, sir, he did.
Q. Were you aware that Jerry and Mr. Ferrari were having some problems?
A. Well, I would have to say, yes, sir, I know, I know that Jerry's committed offenses against him in the past and -- but it wasn't nothing really out of, out of lying

in front of me that I've seen. I know about his charges, and I do know that he's been charged with theft from him. But to me --

Q. All right.

A. -- if there wasn't, if they chose to still communicate with each other, that wasn't for me to decide.

Q. How would you characterize the conversation that you had with Mr. Ferrari on that date?

A. I will characterize it as he was trying to get me to stop bringing Jerry around, basically.

Q. All right. Did he give you any idea of what kind of work he would like you to do for him?

A. Well, he did ask me if this was my van. And I said, yes. And he's like, Well, maybe I could use you. And it was the first time he told me, maybe he -- I can get the work with D.P., maybe we could work out something together.

Q. Now, did there come a time when you went to Mr. Ferrari's house?

A. Yes, sir.

Q. Had you ever been -- when was that?

A. I have been to the Ferrari's house about five times altogether, about four or five times.

Q. What would cause you to go to their house?

A. Bringing Jerry over there to get money.

Q. Okay. And when you brought him over there, did you ever go inside the house?

A. No, sir.

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All right. Did you ever see Mr. Ferrari?

A. Oh, yes, sir. I have seen Mr. Ferrari before in front of his house, and which he would wave to me or something.

Q. All right. Now, when you would bring Jerry to Mr. Ferrari's house to get money, where did that transaction take place? Was it in the house, in the van or outside, or where?

A. Well, one time it was outside, which he went in his trunk and got the money, out of his blue bag that he has in his trunk, and other times where he just, Jerry just went in the house and got it.

Q. Now, did there come a time when you scheduled a meeting with Mr. Ferrari?

A. Yes, sir. At that time, this also goes back to

Friday, he said probably about Wednesday or Thursday we can meet at my house and discuss this interview.
Q. Who was the we?
A. Me, him and D.P.
Q. Okay. Now, did you know D.P.'s name.
A. No, sir, I didn't.
Q. Did you ever ask him his name?
A. No, sir, I didn't.
Q. Did you know where he lived?
A. The Fisher housing projects.
Q. Now, did there come a time -- well, on the Thursday when you were there, the Wednesday that you were there, Mr. Ferrari's house, was there any conversation about whether or not you were going to be able to be there the following day?
A. Yes, sir.
Q. What happened?

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A. Mr. Ferrari came to my van, to the window of my van and said meet me tomorrow before six o'clock because I will be busy after six o'clock, my family is going to meet for dinner, and he said, but don't come no earlier than five o'clock.

Q. Okay. Now, did you have the occasion the following day to go to Mr. Ferrari's house and meet with him?
A. Yes, sir, I did.
Q. How did you get over there?
A. My van.
Q. All right. Who was with you?
A. My little brother, Eric Gai.
Q. And who was driving the van?
A. I was, sir.
Q. All right. Why did you bring your little brother with you?
A. Well, I, I chill out with my little brother every day. We became pretty close friends, and we just -- I called him and asked him if he wanted to come hang out with me, which he said yes. And so I picked him up at his house.
Q. Okay.
A. That was --
Q. The van you were driving, was that your van?
A. Yeah. It was my father's van, sir.
Q. And how old was your little brother Eric?
A. Seventeen.
Q. Okay. You hadn't obviously spent much time with him the last five or six years, had you, when you

were in jail?
A. No, sir.
Q. All right. Now, did you know how to get from where you live to Mr. Ferrari's house?

A. Yes, sir. But as I entered the neighborhood, it's a pretty confusing neighborhood.
Q. How so?
A. It is just a maze. French Branch is very confusing, At first. Jerry's got lost going to his house with me.
Q. Okay. Now, when you went to the house, did you park the car, get out? What happened? How did you --
A. My van?
Q. Yes.
A. When I went to his house, my little brother asked me can I drive around, and which I told him yeah, you could drive around. I always let him drive around, and my girlfriend's cell phone, because that day we had switched cell phones, because my cell phone was dead that morning, so, so I plugged it up for her and took hers. I left it in

there with him, so, you know, if I come out and he's not there, I can easily just call him on Lewis' phone and he will come by. But usually he will be passing by, I know he will.

Q. Were there any cars parked in the driveway?

A. Yes, sir. There was a white Jeep and a white -- now I know it's a Buick, before, which I thought was Lewis' car.

Q. Did you know whether or not Lou was home at that time?

A. I thought he was home.

Q. So what happened at that point?

A. Well, at that point, I went to go into the garage and it was open.

Q. Let me stop you for a second. Where was Eric?

A. Eric was in the car backing out, because I had gone In the garage.

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Q. Why did, why --

A. He's already -- I -- it's just his sole temptation to drive around, he is always driving around, which the door, the first door was already open and I walked right in it, you know. Eric is still right there, but he is backing out at that time.

Q. What did you tell Eric?

A. What did I tell him?

Q. Yeah.

A. I told him he could drive around in my van.

Q. All right. Where did you enter into the house from? Did you go through the front door? Where on the house did you go?

A. The garage was open and they had a door right there, and the door was open, and that was the door I have seen Jerry go through, that's the door I have seen Lou come out of, so I knew that was the door that they used.

Q. All right. And what happened after that?

A. Well, I walked into through that first door, which was open already, and there was a second door. At that time, I knocked on that, that second door and I waited and nobody answered, so I knocked on it again and I waited a little while, , nobody answered, so I turned around at that time -- can I use this here (indicating)?

Q. Yeah, we can do that. This diagram that's right here, your former lawyers received a copy of that about a year or so ago?

A. Yes, sir.

Q. And they have given you that?

A. Yes, sir.

Q. And since I have become your lawyer, you and I have looked through that?

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A. Yes, sir.

Q. So you have seen that before?

A. Oh, yes, sir. I have copy of that right over there on the table.

BY MR. WILLIAMS:

Okay. Your Honor, may my client have the permission, if need be, to stand up to point.

BY THE COURT:

Yes.

EXAMINATION BY MR. WILLIAMS:

Q. All right. Tell the ladies and gentlemen of the jury what happened.

A. As I came to September 5th, when I come to Lewis Ferrari's house for an interview, I walked through this first door right here, which was already open.

There's a second door right here. I knocked on this door. And as I waited, nobody answered. So I knocked again. (Indicating). And when I turned around to finally decide to leave, the door opened up. And when the door opened up, I turned around and it was D.P., the individual who was there with Lou. And Lou was expecting me at this time. So I walked in -- he told me to come in. I walked in the house and he closed the door and he had a gun in his hand. At that time, he grabbed me by my neck and he said, Where is Lou? I said, I don't know, I thought he was here. And then at that time he feels my pockets. I don't have nothing but my wallet in my pocket.

Q. Mr. Montejo, sit down when you are not explaining, because you are kind of blocked.

A. Okay. Well, at that time we are right here and he pulls my wallet out of my pocket and backs up, about right

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here (indicating), and opens up my wallet and lifts out my license, and he is looking at my license and he says my name, which he already knows, but he repeated it, Jesse.

He goes, I know where you live. He goes, I know where DeSoto Street is, right off of Old Spanish Trail next to Lopez. You got a big mouth, Jesse? And right there I knew, I knew what he was trying to say. I said, No, man, I don't, I don't, I don't have a big mouth. I am not a snitch. Don't worry about me.

I already see he's dressed in all gray sweatshirt and all gray sweat pants and he has gloves on with a gun in his hand. I said. No, I don't. And at which time he grabbed me, he goes, I don't think you understand. And he brought me around this here, and brought me right here, and put me down on my knees right here, and he was putting the gun to my head and he is telling me, you know, what will happen if you open your mouth, Jesse, he goes, I will kill you. And if I can't, if I can't get to you, one of my home boy will do it. And if I can't find you, I will kill one of your family. And if I can't do it, one of my home boys will do it, with pleasure. And it ain't nothing but a -- that's when he pressed the gun in the couch and shot it, trying to intimidate me, which worked very well. That's why that hole is in that couch.

And at that time I guess he heard Lou pull up. I didn't hear nothing. At that time I am freaked out, I am paranoid. I am scared to death. So he grabbed me, he starts pulling, Come here, come here. I am like, What? He's like, Lou's here. So he pulled me down this way, right here. When we get right here, he goes, Get up under the bed. And I went to go get up under the bed this way, which is the way he pushed me to go, but there was so much

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stuff out the way, I tried to push it out the way, but there was still too much stuff. I got up and I automatically started coming back. And he go, Come here. He pointed right here, and at that time we can both hear Lou. I know I hear Lou, right here, so I know he does, and I am deaf in one ear. (Indicating). So he tells me. Get down, get down right there, and he backs up right here, and this is a cutoff, which at that time I got down right there, which is a rug right there and it's dark right there. And you have the dishwasher right here. So I see white and then I just see dark. So I got in the dark area. And at that time Lou, which was coming in the house. So I am hearing Lou walking and I am thinking, as soon as he walks past me, I am going to run. But then I am scared because the thought also came in, this guy might come out and shoot me in the back. So I don't know what to do. At that time Lou walks past, walks right around into the kitchen, where I am at. I put my head down as I heard him footsteps right here, because I didn't want

to follow him with my eyes and him pay attention to me 'cause I am thinking about running, but instead he just walked right in the kitchen. (Indicating).
And when I heard him put his stuff on the counters right here, I looked up, I knew he was about to see me, he's going to look at me, right here. I am right here.
So, I stood up, in which he walked right here and just looked at me like that, and then at that time this D.P. came straight out in that instant and hit him. And at that time, Lou came forward on me, and as the fall and grabbed me. And at that time, he turned around, because I broke his fall, he turned around and swung at D.P., in which D.P.

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weaved him and shot that first shot. And at that time, he backed up and he threw his hands up. (Indicating).
From my, what I seen standing right here, I was pretty sure he shot him, but I still had a little

doubt from him still standing up, with his hands up. And at that time, I threw my hands up. And at the time, D.P. is waving the gun between both of us, Don't move either one of you. If you breathe, I will have to kill you. And then that's when Lou kind of looked at me, with a little suspicion. And then at that time, the guy turned around and looked at Lou and said, I hate to do it, but you're stupid, you leave the house all unlocked, no alarm, with a loaded gun sitting right on the side of your bed. And then at that time he said, This wasn't even a plan, but because of your stupidity, this is how the cards fell. And at that time, he is like, now I want your big stash. And Lou responded, I just paid everybody, but there is about twenty-five hundred in the bag, because at the time he had his bag in his hand, which I also forgot to mention. When he turned around, he had his bag in his hand still, that he dropped right there, when he saw me and he walked right there, there is about twenty-five hundred in the bag. So the guy automatically says, I don't want that little shit. I want your big stash right now. And Lou says, I don't know what you are talking about. The guy says, So you want to play dumb, huh? He looks at me, pointing the gun at me. He goes, I see, I know about you, you are just getting out of prison, I don't think you are going to tell. You going to tell? I don't think so. He goes, I know what you want. And he backed up a little bit, just about right there, which he picked up the bag and he squatted right there, and he

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opened up, there was some envelopes with cash in it, and he passed it up and he opened up a book -- a box and it had money folded over. And he grabbed the money and he pulled my wallet out, and he was looking at me as if to test me, and gave me my wallet. And then told Lou, Give him your car keys.

At that time I, I said, Look, I just got out of prison, you know, I can't just take his car like that. I already knew his intentions. I told him I got dropped off.

So he's like, No, I don't want you seen, I want you gone.

And then at that time Lou automatically butted in, Here, here, take, go, get out. Lou is trying to get me out of the house. So at that time, I accept the keys because I have to. There is nothing I could do about it.

And the guy tells me one more time, he says, Now, remember, Chief, it is you or your family, it's on you, from here, get out of here. At the time I walked to leave, I come out. As I go to close this door, the last shot was, the gun was to his face, I heard that shot. He had the gun to Lou's face, and I heard the words before I exited the door, If you don't cooperate, I am going to shoot you in the face. He said, I am going to cooperate. And that's when I walked out, started to close the door and heard the shot. Automatically I hauled butt, came out, I seen Lou's car, because it was the only one that wasn't there when I pulled up, and he has the little buttons on his thing, to unlock his car. I got in his car and left because Eric was not out there. I got lost for a second. Somehow I ended up coming back around. (Indicating).

Q. Mr. Montejo, have a seat. Okay. When you left the house, was Eric out there?

A. No, he wasn't.

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Q. All right. And how long did you wait for him?

A. I did not wait for him for a second. I just heard that shot, and I am not going to stand right there for nothing. I was gone.

Q. What car did you get into?

A. I got into Lou's car, as I was told to do, and it was the fastest way to get away.

Q. Which way did you pull out of his driveway?

A. I pulled out of his driveway and I went the opposite way, but I knew I couldn't leave Eric in that neighborhood, I don't want Eric to come and knock on that door. So at which time I looked for him and I came back, and then that's when I seen Eric speeding around, coming around the corner, but he is not paying attention to me and he is not trying to stop because he's not looking for me to be in that car. So that's when I came behind him and we almost had a little collision because he is not paying attention to me, trying to call him, because he wasn't focused on the car. So when he turned on that street, I turned behind him, and I had to literally cut him off because he wasn't paying attention to me.

Q. All right. Do you remember the lady that testified yesterday?

A. Yes.

Q. About what happened, or the day before, which that was an accurate account, when it said it looked like the white car cut the van off?

A. Yes, sir, that, that was true.

Q. Then what happened?

A. That's, that's when I cut him off, and I was getting his attention, he was looking at me. That's when I told him, Follow, follow me. He's looking, and when he realized

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who it was, like, okay. So he followed me. At which time I went straight over there towards to my dad's house, because I don't know where else to go. But then I thought about it, I said I am going to leave this car in a place where I have seen before, joy riding around. I went to the end of Howzie Beach Road, on the levee, and I have noticed a little dirt, dirt end road right there and that's where I left the car at.

Q. Did you take anything out of that car?

A. No, sir.

Q. Did you have a gun with you then?

A. No, sir.

Q. What did you do with the keys to the car?

A. I took the keys with me.

Q. Did you lock the car before you left?

A. No, sir.

Q. You left it unlocked?

A. Yes, sir.

Q. What did you do after you left the Lincoln?

A. When I left the Lincoln, I came back up the levee --

Q. Let me stop you for a second. We have had the opportunity to look at the pictures of this case, pictures that have been introduced into evidence that show the Lincoln parked on a kind of gravelly road in the woods?

A. Yes, sir.

Q. Is that where you left the Lincoln?

A. Yes, it is.

Q. And where was Eric?

A. Eric was on the top of the levee in my van. He got out of my van, and at that time he's just looking at me.

Q. Then what happened?

A. I got out of the car. And I went up the levee and

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Eric is like, What's up with that? I said, Just chill out, get in the van, I will tell you later. And that's when I got in the van, in the driver's seat, and he got in the passenger seat, and I left. Eric still doesn't know, he just seen me in a car, and he is asking me, Man, what's going on with the car. I said, Don't worry about it. I am going to tell you. Just chill out.

And then, so he told me, my, your gas is completely out -- I mean, your van is completely out of gas. So I went to the Shell station. I got some gas. And then we left. And we went to my apartment complex. At which time I stopped and I just sat back and I took a breath and I just waited a minute, and he's asking me, Man, what's up with that fellow, I don't like that.

I said, hold on. I pulled out my wallet, I grabbed the money that was put in my wallet and I gave it to him.

I said, Here, hold this, put it up somewheres. All right.

So he took the money and put it in his pocket. He is like, So tell me what's up, man. I told him, Man, look, something bad just happened in that house. I told him the guy that I was supposed to be going for an interview with was in there, but the, but Lou was not. And I said, And he had a gun in his hand and he looked at my license, he seen your address and he threatened to kill either me or one of my family if anything was said, period. I take it I walked upon him in the middle of a burglary, but we was expected to be there. So I don't think it was a surprise to him that I showed up.

Q. Did you spend -- how much time did you spend with your brother at that point in time?

A. A little while. A good little while, explaining it down to him, what happened, and at which time I told him,

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he got scared, he is like, Man, look, we was over there, I went around there, in your van, you know, what's going to happen? And I told him nothing. I told him, Look, you don't ever say nothing, I don't care what the circumstances are, don't never say nothing. And I don't care. If you get put in any predicament, you just tell them to come to me and I will take care of it from there, don't never say nothing about this guy period, ever, I don't care what the circumstances are.

And he is like, Well, what is this money from? He is like, You didn't have nothing to do with it, then what's this money from? Then I explain to him about the bag, and I said, See that car I just dropped off, usually Lou keeps a bag in there with money on it, in it, but this time Lou brought it in with him. I think maybe he had some stuff to keeping track of, because he had just paid people that day, but he brought it in with him that day. And I told him where the guy gave it up to me from.

Q. How do you know he paid people that day?

A. Well, he said it. He said it right there, I just paid, I just paid everybody, but there's about twenty-five hundred in the bag.

Q. Now, where did you spend the night that night?

A. At my apartment.

Q. Where is that?

A. At Forest Willow apartments.

Q. Did you make plans to leave the State of Louisiana?

A. No, sir. No, sir, not at all.

Q. Did you know that Lou had been killed at that time?

A. I was pretty sure, but there was a possibility that he wasn't dead, there was a possibility.

Q. All right. Why didn't you go to the police, Jesse?

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A. No, because this guy knows where my family lives, this guy knows me, and there's no way in the world I could have ever took that risk. I mean, I don't want to die and I am not going to ever put my family in that predicament. Knowing this guy, from what I observed is from the Fisher projects, and I know the capabilities that they have over there, I am very familiar with that area of the West Bank, and they will kill my family, and there's no doubt in my mind, and I am not going to let my dad come walking out of his garage one day and get a bullet come flying out them woods and be dead because I told on somebody.

Q. Now, where were you the next day?

A. The next day I went to Jerry's house. Went to go to Jerry's house. I had slept that night, cleared up my mind. I went to go to Jerry's house. At which time when I -- his daughter called me on the phone and asked me for a ride, but I was already on -- in New Orleans, going to the West Bank and I told her I couldn't do it because I was --

Q. Where was she calling you from?

A. She was calling me from one of the cleaners, one of the Corporate Cleaners. And I told her I couldn't do it because I was already across the lake. And so she, at that time she told me, you heard about what happened. I said, no. She told me Lou got murdered. And that is when I knew he was dead. And that's when I got really, really, really even more scared because, I mean, I was pretty sure he was dead, 'cause I seen that gun at his face as soon as I was walking out that door and that gun fired. But I figured there was a possibility maybe he wasn't, because I have heard plenty incidents where people have survived a shot to the head.

Q. All right. Now, what happened when you were driving

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toward the West Bank?

A. Well, I went to Jerry's house. At which time his wife and his daughter informed me that he wasn't there and that he will be coming back in a little while, you could come back. So I was like, okay. Well, I left.

Q. Why did you -- why were you going to Jerry's house to start with, Jesse?

A. Why was I going to Jerry's house?

Q. Yes.

A. Because I wanted to see, you know, if, you know, what else, did anything new come up in his head since the day before, when he acted like he didn't care, 'cause I told him the night before, and he acted like he didn't care. I wanted to see if anything, you know, if he had anything else to say or if he wanted to work that day, anything, just anything to move my mind, that day. I didn't know -- my mind was going in every direction that day. I didn't know what to do about nothing.

Q. Did you plan on telling Jerry what had happened?

A. Yes, sir. I did tell Jerry.

Q. Why?

A. I have already told Jerry, but I didn't make all the exact facts clear to him. I didn't make all the exact facts clear to him.

Q. When did you tell Jerry?

A. I just told him that this guy --

Q. I said when.

A. When did I tell him? I told him the same day it happened, that night. I went to his house.

Q. Okay.

A. And at which time I told him what happened and he just seemed like he didn't care. And earlier when he

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called me on the phone, he asked me to borrow some money, which was he asked me to borrow sixty dollars. So, that's all he wanted to see me for anyway. So I went on ahead and loaned him the money and just got him out of my van. I said, go ahead then, go ahead, Jerry.

Q. Now, so you actually went to Jerry's house that next day?

A. Yes, sir. I went back to his house the next day, 'cause --

Q. Who was there?

A. And his wife and his daughter was there, which they told me he would be gone for a little while, to come back.

Q. Okay. Then what happened?

A. At that time I left, wasted time until it was about, 11:00, about 11:30, 11:40, somewhere around there, where I was actually making my way back to Jerry's house. And when I hit the corner of Rose Street, on 23rd, is where the police surrounded me, jumped out their cars with guns at me, came -- ran up to my van, opened my door, grabbed me and pulled me out and put me on the ground and handcuffed me and told me I was under arrest for first degree murder, put me in the car. And at that time, about -- I give it a good five or six officers rushed my van, they was just all in my van until I made a comment, Why are you all in my van? And then they all backed up. And the chief of police was there, and I know him, because he lives next door to my grandmother, and he told me there's nobody in your van. I said, I just seen it with my own two eyes, but all right, to stop from being -- digging around in my van.

Q. Did they handcuff you?

A. Yes, sir, I was handcuffed.

Q. Where did they bring you?

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A. They brought me to Gretna police station, into a little room and handcuffed me to the wall.

Q. Did there come a time when the detectives who testified in this case came to get you?

A. Yes, sir. At that time they walked in the room and they told me, Oh, we just wanted you for questioning, you're not under arrest, though. And at that time, I told them, Well, if I am not under arrest, you know, what I just experienced was quite dramatic for not being under arrest. Can I please leave? He is like, well, we have some questions we want to ask you. And I informed him at that time I don't want to talk to nobody, I don't have no information for nobody, for nothing under any circumstances, can I please leave. Like, no. I said, Well, can I have a lawyer? He said, Well, I wouldn't advise that, because right now, you know, we need to question you about some serious matters. And at that time, I told him, Well, I am allowed to have a lawyer present, ain't I? He's like, Yes, but we wouldn't really recommend that. And I was just telling him, Well, I thought you just said I wasn't under arrest? He is like, you are not. And, you know, but I have some important questions I need to ask you.

And I am like, well, if I am not under arrest, can I please have my keys and leave, get in my van and leave.

And at what point in time he just told me no.

Q. Did they bring you somewhere?

A. Yes, sir.

Q. To where?

A. Slidell.

Q. All right. And what happened when you -- do you remember about what time it was when you got to Slidell?

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A. It was about four o'clock.

Q. And you have seen the videotapes of that little room. Do you remember when they first brought you in that room?

A. Yes, sir.

Q. Okay. And that was about, I think they said 4:38?

A. Yes, sir.

Q. Is that about right?

A. Yes, sir. Well, that's what time he actually ended up bringing a Waiver of Rights form and getting me to sign.

Q. Did you sign the Waiver of Rights form?

A. Eventually I did, which made it at 4:38.

Q. You have seen the tape of that conversation?

A. Yes, sir.

Q. It was about two hours and seventeen minutes when the tape is not running. Tell the ladies and gentlemen of the jury what happened then.

A. Well, at that time --

Q. Please stop swiveling your chair.

A. Well, at that time -- I'm sorry, I am nervous.

Q. I understand.

A. At that time, they begin questioning me about Jerry, and I was still telling them I don't know nothing, there was nothing in the world that anybody could have ever told me to tell what really happened in that house, that day. There is nothing could have ever got me to tell. And they told me that Jerry, they talked to Jerry at, about three o'clock in the morning, and Jerry sent them to me, Jerry gave them my information and Jerry said I know something. So they were trying to basically get me mad at Jerry. And then, they just just saying, did Jerry do this, you can tell us if Jerry did this, you don't want to spend your life in jail, you can tell us if Jerry did this. And they said, Did Jerry do this? Just tell us Jerry did this and we can release you as a witness. You want to go home, right?

And after so much pressure and then they brought out murder and manslaughter, and they told me the difference between murder, if this was an accident, you see it is not murder. See, manslaughter is for something that accidentally happens in the heat of passion. And they just started explaining stuff to me, and they're like, it is zero to forty, you could even get probation if this was truly an accident. And then they said, earlier, at this morning when we talked to Jerry, we asked Jerry if there was anybody who you always hang around, and Jerry told us your little stepbrother. Did your little stepbrother do it?

And at that time, in which I completely told them no, because which he didn't. Eric did not do nothing at all.

And they're just, after so much pushing and pushing and pushing about Jerry, I mean, they were brainwashed, they were basically letting me know, if you don't say this was Jerry, then, you are not going nowheres. So eventually I began blaming it on Jerry, trying to put Jerry in the foot of the actual person who did it, trying to make up stories on Jerry. And I began accusing Jerry, which everybody seen.

And then, after a while, they, they just came in there, they were just pushing it and pushing it and pushing me to say something. And once in a while whenever I would give them one little fact, there's no way I could tell them who did it. So if I am not saying it's Jerry, when I would begin to tell them about an unknown, unknown male who did it, they didn't want to hear nothing. I made several

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admissions about my family. I can't tell you, you won't believe me who did it, and I can't tell you who did it, because they will kill my family, they will kill me, I made a comment about these are project mf's and all that. Jerry's family is nothing to do with project people. Actually, Jerry is the only male I have met in his family, and the rest are pretty, they all pretty much females.

Q. Now, did there come a time before ten o'clock when they started raising their voices with you?

A. Yes, sir.

Q. Threatening you?

A. Yes, sir. At the time they were telling me, we know you did it, you did it, we know you did it, this is your last chance to tell us it was an accident, tell us it was an accident.

Q. All right.

A. They were just, they were just pushing. I can't tell you you all the exact words, but they were just pushing me so hard, to where eventually I was just like, I mean, I am so tired, and I have said it I don't know how many times in there, and, you know, I am sure everybody can understand, because how tired did everybody get watching it, and I never moved that whole time. Not to mention that, I was there two hours and seventeen minutes before you all even seen anything. And then not only that, I was in custody at around eleven-thirty before that. I was, I was, I was delirious. There was, eventually I was just like, Okay, I did it, I did the crime. I would tell them I did it before I would tell them he did it, because I could tell them he did it and then go run somewheres and hide, but my dad can't hide, my whole family at that house can't hide.

Q. Now, on the videotape there was a time when you said

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you wanted to have a lawyer?

A. Yes, sir.

Q. All right. You remember the response of Detective Morris?

A. As soon as I asked for a lawyer, Detective Morris stated, All right, well, we can do that, you are under arrest for first degree murder. And when he did that, that did scare me, and that let me know, he read first degree murder to me earlier, Major read first degree murder to me earlier. So he just told me right there that they are taking me to jail for purposely killing a man who I had not a single bit of anger towards ever and which seemed like a pretty good man to me. And, you know, I -- what could I do when he tells me this, you are under arrest for first degree murder? And then that's when I said, No, wait, come here. I said -- as everybody saw, No, wait, come here. Then he turned around and said, No, I trusted you and you let me down. He is letting me know, you know, I haven't gave him what he wanted to satisfy his needs.

Q. All right. When you sat up and watched the tape here, the tape is turned off, what happened when that tape was turned off?

A. Well, the tape was turned off, they left, and then after a couple of minutes Morris came in there and told me, I don't know if I could get another chance to save your life, and then that's when I said, Well, let's talk. And he said, Well, he said, and, you know, maybe your little brother, too, you know, maybe, maybe you could save him, too. I said, Well, let's talk. He said, Well, I can't, you asked for a lawyer. You know, if it shows that me or anybody else in here has talked to you or got you to talk to us, then it won't -- you won't be able use it to show

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that Jerry, that you are sorry for killing him and they will convict you for first degree murder. And that's when I said, that I am not going to tell nobody, nobody talked, let's talk. And that's why I had so much stutter in me when we came back in there and they turned on -- he left and they came back in there. He said, let me know before I go turn it on, and he left and they came back in there, and he asked me, Did you talk to anybody in here? That's why I had so much hesitation within there, and that's why I went to talk, What you all going to do to me, what you all going to do to me?

Q. Did you know when they turned the tape on and off?

A. Did I know when they turned -- no.

Q. When you were sitting there that night, did you know that there was even a tape going on?

A. Not until he told me, which was further into the interview. At one point in time, I don't remember exactly what point in time it was, I believe it was when they started really raising their voice at me.

Q. When, when -- how long after you asked for a lawyer, how long did they continue to question you?

A. It was a couple of hours. I couldn't pinpoint exactly how many hours it was, but it was a couple of hours. I mean, hours which just felt like a whole day to me at that time.

Q. When they finished talking to you, did they bring you somewhere?

A. When they finished talking to me, yes. They bought me out, they bought me to a Highway 11 bridge, at which time -- 'cause at one point in time, I told them, I guess, that I had threw the gun off the bridge, or the Twin Spans, one of the two, but --

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Q. Why did you tell them that if it wasn't true?

A. Well, because they were making, they made their mission earlier in there, you know, you could have thrown the gun in the river, it was what they said. I believe that's the first thing I said was, I threw it in the river, but I know I am right here by the lake, so I just said the lake. But I think the first time I said was the river, with them. But one of them, I forgot which one it was, said, Well, like, he could have easily thrown it in the river, you know. So I gave him that off of what he said.

Q. You you were lying to them?

A. Yes, sir, I was.

Q. About almost everything?

A. Yes, sir, I was.

Q. They were lying to you about almost everything?

A. Yes, sir, they was.

Q. What were you thinking?

A. I don't know what I was -- I was, my mind was everywheres at that moment, and my mind was just struck, I need to tell them whatever they need -- I need to tell them just to occupy them, and waste time, so -- till I could figure out what I could do, because right now my mind is not stable enough to tell them what happened and be certain in my heart that I want to tell them what happened. I hadn't, I did not have that certainty to tell them what happened. So there's no way I would have until I sat down and waited awhile and decided, that's what I want to tell them.

Q. Now, you remember what time it was when they brought you to jail and booked you?

A. I do not remember. But it was awhile, and at that time, Morris told me, Look, you know, your, your, your

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statement, your confession and all, he is like, it is not piecing together, you still have a lot of contradictions, it's not sounding right. You know, it's like, we need to make another, another one, another clearer version, you know, because we don't want to mislead the jury, so we need to make a cleaner version of, you know, what you did and stuff.

Q. When did he tell you that?

A. That's when he, I was showing them supposably where I threw the gun off the bridge.

Q. Who was with him when you did that?

A. I believe it was Morris. I was just listening to Major at that time.

Q. All right. Now, on September the 10th, in the morning, do you remember being brought into the video room?

A. Uh --

Q. -- in the jail --

A. Yes.

Q. At the St. Tammany jail where you are staying now?

A. Yes, sir.

Q. Do you remember having a seventy-two hour hearing?

A. Yes.

Q. You know what a seventy-two hour hearing is?

A. Now, I do, to -- I know what it means now. At that time they advised me of what I was charged with, and told me I had appointed counsel.

Q. And that was before Hall and Major came and got you later that day, isn't it?

A. Yes, sir.

Q. Now, the judge advised you, was he there in person or on the television?

A. He was there in person, sir.

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Q. All right. And the, the IDP was appointed?

A. (No response).

Q. Did you know what that meant?

A. No, sir.

Q. Did you know that was a lawyer that was appointed for you?

A. He said, he said he was appointing counsel in whichever words he said it in and basically got the message to me that somebody was appointed to me.

Q. Now, when Major and Hall came to get you that afternoon, what did they tell you?

A. They asked me if I would come with them to go clear up where I threw the gun at. So I said, Well, and I don't, I don't, I don't really want to go with you. He said, Do you have a lawyer? I said, yeah, I got a lawyer appointed to me. He said, No, no, you don't. I said, Yeah, I think I got a lawyer appointed to me, and I guess that's where I messed up, when I said I think I got a lawyer appointed to me. He said, No, you don't. He said, I checked, you don't have a lawyer appointed to you.

Q. Who said that?

A. That was the one that was sitting here, Hall.

Q. All right. What did you say when he said that?

A. I was like, Well, I thought I had one appointed to me. He is like, No. He is like, I need you to come with me, will you come with me. At which time I was like, okay. Back then in them days, in the two-and-a-half years ago, I had a very gullible character, I was very easily led. I mean, it is obvious. Everybody seen it for their self. Everything that these police have said or did I followed right behind them. I was --

Q. All right.

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A. -- very easily taught. You could tell me anything.

Q. Where did they take you when they checked you out of the jail?

A. They took me back to the Highway 11 bridge, asked me where did I really throw it. They said we have been searching, and they said you lied to us, because there is no way in the world that you threw it there, he said, because they see clearly at the bottom, they could see fish hooks, cans and stuff underneath that water. He said they have about three to four feet of clear, they said there's no way in the world that they will go miss over that gun. He said they will find that gun if it was in there and it's not in there. And I told them, I said, Look, I really didn't throw it in there. And at one point in time he got mad at me.

Q. Who?

A. Hall actually got mad at me and told me, I am about to lose my job over this case. I told him, Man, look I threw the gun out over there, and showed them another spot. He chose to still go to that spot and search. I just told him I didn't really throw the gun in there, but he got mad at me and told me he was about to lose his job over this case.

Q. All right. How long were you out on the road with them?

A. Oh, we was out all day. We was out until nighttime. I came in -- by the time I came in, it was dark, because we pulled in front of the post office.

Q. The statement that was played today for the jury, when did that take place?

A. That was, that was early in the morning time. I don't know if it was exactly three forty-five, but it was

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early in the morning time. Because when I came back from Major and Morris, when they brought me in and they put me in the little stand-up cage, which is about three foot by three foot, you just stand in and it's got a hole that you answer questions to one of the security guards. I stood up in there, and I was in there for maybe an hour or two hours. I don't -- can't pinpoint exactly. This was two-and-a-half years ago. And I stood in there for about an hour or two hours and I was brought right back out and brought to Covington. And I don't -- you know, they sat down there talking to me a little bit and, you know, Major kind of rehearsed quite a few questions with me. You know, they wanted to make sure that I had an excuse and a reasonable confession. And then they turned it on again.

Q. Now on the 10th when Hall and Major got you out, did they bring you to the West Bank?
A. Yes, sir, they did.
Q. In New Orleans?
A. Yes, they did.
Q. Now, did you point out a Shell gas station?
A. Yes, I did. And the reason why I did that is because he told me, he said, Look, we searched I-10, we searched the interstate, you know, there is not one sign of the bag being burnt nowheres at that dumpster, and there's nothing on I-10. And I told him, Well, causes I really didn't have it, and that then again, he then got mad at me again. He said, Where is it? And I told him, all right, it was at a Shell station. Which one? I said, I don't remember which one. You have to --
Q. Was that true?
A. No, sir, it is not.

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Q. Now, you heard the testimony today, there's two pieces of legal pad, one where you wrote to Ms. Ferrari and one that you give them permission to do something or another. Did they tell you what to write?

A. Sir, it was Detective Hall's suggestion to write apology letter, and during his suggestion, he told me, you know, just let them know, you know, why you are apologizing that it wasn't intended to be an aggravated burglary, that it was supposed to just be a simple burglary, and he popped up on it.

Q. Do you know what a simple burglary is?

A. At that time I did not. And when he said it, it sounded like just plain, you know, like --

Q. Like, an easy burglary?

A. A simple burglary, yeah. That's, that's what it sounded like to me when he said that. I didn't realize until after I've been here for so long that a simple burglary is actually a statute.

Q. So that's his suggested words to you?

A. Yes, sir, say that it was a simple burglary. And at -- when I wrote the letter, Hall didn't stand next to me, though. It was Galloway, Detective Galloway sat next to me, and at that time, when I am making this apology letter, I really do in my heart, I feel sorry for the family, and I apologize to the whole family for what happened. I swear to God I felt sorry for that. They -- I can't, I was really, really apologizing to the family in that letter, because I was really sorry for what happened, period. I know I didn't do it, but I am still very sorry for what happened.

And I was writing that apology letter and Galloway was sitting next to me, and as I would write a couple of

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lines, he would say just put that you didn't have no intentions, and I would put that, but then I would keep going on apologizing, and that's when he said, remember what Hall said, just write that it was a simple, a simple burglary, meant to be a simple burglary, I came up on it, that's when I wrote that.

And then he began, on the next page, Galloway was telling me, Well, just tell her a little bit about what happened, let her know that you was in there and you found the gun and he came home on you, and you tried to knock him out, but -- with the gun, but, you know, he kept fighting, and, you know, and so I wrote that as -- I was basically writing everything he was telling me, along with some of my own personal apologies.

Q. Now, you have seen the evidence, which has been introduced. You saw a pair of gloves. Were those your gloves?

A. I don't recognize them gloves. I do not recognize them gloves, but I did have a pair of gloves in my van, at which time I did use, one time, for changing the tire, which my dad bought me a new tire at Wal-Mart and, but I do not remember keeping them gloves.

Q. Did you have any gloves on when you went into Mr. Ferrari's house?

A. No, sir.

Q. On September the 5th?

A. No, sir.

Q. The picture shows a green button-up shirt. Is that your green button-up shirt?
A. Yes, sir.
Q. Was that, is that the shirt you had on when you went into his house?

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A. Yes, sir
Q. Was there any blood on that shirt?
A. No, sir.
BY MR. WILLIAMS:
One moment, please, Your Honor.
EXAMINATION BY MR. WILLIAMS:
Q. The pictures that were shown today, I show you State's Exhibit 62 through 65. Could you examine these pictures?
A. (Witness complies). Yes, sir. That's me.
Q. Are those the pictures that we saw that were taken when you were in Slidell by the crime scene technician?
A. Yes, sir.
Q. There appears to be a fresh scratch on your neck?
A. Yes, sir. (Witness nodding head affirmatively.)
Q. Where did that come from?
A. I believe it came from Lou when he grabbed me.

Q. Did you have that before you went into Lou's house?

A. I don't recall having it before I went into his house.

Q. Did you go into the Ferrari's bedroom and ransack it looking for money?

A. No, sir.

Q. Did you find a gun in that house?

A. No, sir.

Q. Did you shoot Lou Ferrari in the face?

A. No, sir.

Q. Is that the truth so help you God?

A. That is the truth so help me God.

* * * *

CROSS EXAMINATION OF MARY MELANCON BY MR. GRACIANETTE

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* * * *

Q. You recognize Jesse's handwriting?

A. No, I couldn't tell you I would recognize it. I mean, I have gotten a couple, maybe two, two letters from Jesse. I couldn't tell you I would know it. I mean, if I saw it I probably could tell you. It was kind of like a large print, very nice handwriting.

BY MR. GRACIANETTE:

May I approach?

BY THE COURT:
Yes.
EXAMINATION BY MR. GRACIANETTE:
Q. State 76 and 75, does that appear to be his handwriting?
A. If I had my letter to compare it to, I could tell you, but I don't have the letter to compare it to. If I had known, I would have looked at the letter he has written me, because I do have it.
Q. So you have never read these two letters that he wrote to the police and Ms. Ferrari?
A. No, I didn't even know that these existed. If he told me, I don't remember.
Q. And you didn't watch the videotapes in this case to know what he said to the police the first, second --
A. I heard --
Q. -- third, fourth, fifth time?
A. Well, I know that they kept him in custody for quite some time, like for over twelve hours.
Q. I am sorry, ma'am, that's not my question.
A. Oh, I am sorry.
Q. My question is, you didn't listen to the videotapes

where he told the police one, two, three, four, five
different versions of what happened?
A. I heard the story today, that around eleven o'clock
today, I heard, I heard that.
Q. Okay. Not the other four prior to that point?
A. No, I didn't hear that.

* * * *

TWENTY-SECOND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA

THE STATE OF LOUISIANA
VERSUS NUMBER: 355706
JESSE JAY MONTEJO

* *

VOLUME X

TRANSCRIPT OF PROCEEDINGS taken before the Honorable Donald M. Fendlason, Judge Presiding, Division "H", Twenty-Second Judicial District Court, Parish of St. Tammany, State of Louisiana, on March 9, 2005, in Covington, Louisiana.

APPEARANCES:

RONNIE GRACIANETTE, ESQ.
(ASSISTANT DISTRICT ATTORNEY)

SCOTT GARDNER, ESQ.
(ASSISTANT DISTRICT ATTORNEY)

JAMES C. WILLIAMS, JR., ESQ.
(ATTORNEY FOR JESSE JAY MONTEJO)

* * * *

CLOSING ARGUMENT BY MR. JAMES WILLIAMS

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* * * *

BY MR. WILLIAMS:

May it please the Court, gentlemen, ladies and gentlemen.

Ladies and gentlemen of the jury, I would like to take this opportunity, initially, to thank each and every one of you for participating in this case. I have always said, when I have been a participant in a jury trial, that jury service is second only to military service in repaying your community, and I thank each and every one of you for that. I think it was very obvious very early on that if you didn't want to serve on this, this jury, you could have said something which would have caused you to be excused and, to your credit, you did not and you are here, and I think probably I speak for everybody that's involved in this case, we thank you.

Now, I have got an allotment of time to spend with you all, telling you what I think about this case, what I think the evidence has shown and what it hasn't shown, and I don't think

I am going to take my full allotted time, because while I think this may be the tenth day we have been together, the case has gone rapidly. You have heard the evidence. We have worked hard for you to see that evidence. And I suspect it is relatively fresh in your mind, so I am going to just suggest some things to you.

But the first thing that I can't help but think about in this case is you got a case where

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a poor man is killed in his own house. We have got DNA evidence that says that he was there. We got a guy who took the witness stand with a boat load of prior convictions, that the investigators are certain they have got the right man. Why even have a trial? Why have a trial? The investigators are certain that they have the right person. The State is certain that they have the right person. Why do we have a trial?

Ladies and gentlemen, we have a trial, obviously, for a couple of reasons. Number one, because every person who is charged with a crime is presumed to be innocent of that crime until such time as they are proven guilty beyond a reasonable doubt. And we have a trial, ladies and gentlemen, because the trial is a search for the truth.

Now, I am going to make some observations initially about the law that's applicable in this case. Mr. Montejo was indicted for first degree murder during the course of an armed, or attempted armed robbery, and an attempted or an aggravated burglary. I first want to discuss with you the elements of an armed robbery. An armed robbery is the taking of anything of value from someone or that is within their immediate possession through force or intimidation while armed with a dangerous weapon.

And as I explained to some of you all in the first couple of groups, for there to be an armed robbery, it must be proven beyond a reasonable doubt that the person that committed that robbery took something from someone and that the way that taking was accomplished was through force or intimidation while armed with a dangerous weapon.

If you think back on all of the testimony that you have heard in this case, even in the testimony most favorable to the State, even if you believe, you pick one of those statements that Jesse Montejo gave on the tape, there has not been evidence of an armed robbery. There has not been any evidence from any source that Jesse Montejo had a gun and used that gun to take something of value from Mr. Ferrari. There is speculation that that may have happened. But if you think back to all of the statements that you heard, from him, all of the evidence that the State put on, there is simply no evidence that this was an armed robbery.

And when you think back and when you discuss this, some of you will remember some parts of the case. Some will remember others. But you didn't hear anything, in some of the statements to the police, the coerced statements -- and I will get into that in a minute, Jesse says it was an accidental shooting, that money was taken at different times. There's no evidence that at the time of the killing that there was any money taken at gunpoint. There is simply no evidence.

Was this an aggravated burglary? An aggravated burglary, first and foremost, requires that there was an unauthorized entry into the dwelling, where the burglary occurred, which is the taking of anything of value or any other

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felony. So the initial threshold that the State must prove before any jury could consider any kind of burglary would be an unauthorized entry.

We know in this case that on at least four occasions, at least four occasions that Jesse Montejo and Mr. Ferrari had telephone conversations, we know that to be the fact. Mr. Montejo, when he testified, told you the circumstances that surrounded their meeting. You will have to decide, was there an unauthorized entry. I will submit to you there was no armed robbery.

Regarding the law, ladies and gentlemen, the State must prove to you beyond a reasonable doubt all of the elements of the crime that they seek to prove, we know that if you think Jesse Montejo possibly did this crime, committed this murder during an aggravated burglary, that you must find him not guilty. We know that if you think that he probably did this, or possibly did this, your duty will be to find him not guilty. You must be convinced by the evidence that you have heard, you must be firmly convinced of the truth of the charges. That's what the standard of proof is.

Now, let's talk about the evidence that's been presented in this case. First of all, Mr. Gardner very accurately explained to you what the law is regarding credibility that you give to witnesses, and certainly you have the right to consider the fact that Jesse Montejo has a number of prior felony convictions from the State of

Florida that he did six years for. You heard those convictions, and one thing that I submit to you, that he freely admitted every single one of those convictions, didn't try to say, well, I didn't do that, I pled to all of them because the cops made me do that, I pleaded guilty to them because I was guilty and I did my time. He pleaded guilty to all of them, was sentenced on one date to six years in the penitentiary. He was seventeen years old when that happened. Why is that important? If any of those prior convictions had been similar to this case, if the facts of any of those prior convictions in Florida had been similar to the allegations in this case, you would have heard that, from the State. You did not, so you must presume that those cases were completely different from this one, even though you heard that he pleaded guilty to a crime known as armed burglary.

So I would ask of you, I can't tell you all what to do, all I can ask of you is that when you go back, that you listen very carefully to what Judge Fendlason tells you and you follow that Law. But I can tell you, and ask of you, that if any of you all were to say, Well, he did all of those other burglaries, he must be guilty of this one, then I would ask you not to do that. You may and the law allows you to say, I am going to Use those burglaries in determining what weight I Am going to give the testimony that he gave me. But I would ask you not to use the fact that he

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has had burglary convictions before to prove that he did these, because the law simply does not allow that.

Now, some observations about this case. Common sense, frankly. If Jesse Montejo had killed Mr. Ferrari, had killed him during the burglary, had taken his money and had done it intentionally, do you think it makes any sense for him to remain in the State of Louisiana, to go back to where he lives, to go visit his friends, to go visit the person and call the person who probably is and probably and was the very first suspect in this case, Jerry Moore, where he is caught in Gretna? There is a charge that won't be used in this case, it's called flight. And if there's a situation where someone leaves the scene of a crime and attempts to flee, or who leaves the State, if that were the case, the judge would tell you that if somebody flees from the scene of a crime, out of State, that someone could be considered to have -- that could be an element that you could consider in determining whether or not he committed the crime. There is simply no evidence whatsoever that he attempted to flee. That will be something that you will have to consider in this case. When he was stopped by the Gretna police, is there any evidence that he attempted to run away or drive a way. If he had committed this murder, not to say that every person would do that, but some people would try to have driven away, high speed chase. None that happened. What does that prove? In and of itself, folks, it doesn't prove anything, but it is something for you to consider.

I listened very carefully to the State's opening statement. I listened to everything that Mr. Gardner said. And one of the things that he said, and it was basically his attempt to give you a motive for why this crime was committed, why he committed this crime, and that motive was he needed the money, he needed the money because, and you heard on the tapes, I am going to be evicted.

Well, ladies and gentlemen, the truth of the matter is what you heard was that, that wasn't a problem, I had money. Bridgett Gai, my girlfriend had money, she paid the rent. He told you under cross-examination that we had overpaid the rent before. Most importantly, ladies and gentlemen, sometimes it is not what you see, it's what you don't see. Did you hear from the landlord of the apartment where they lived who came in to say, I called them and told them if I don't have my rent money on September the 6th, you are going to be evicted? No, you did not hear that.

Did you hear from Bridgett Gai to come in and say, I was begging Jesse to get money, we didn't have any money, they were going to kick us out? That didn't happen. So ladies and gentlemen, the State has the right to do an opening statement, to tell you how they expect to prove their case, and that was way up there;

first and foremost, we are going to show that they needed the money. That's not been shown to you. That's not been proven to you. As a matter of fact, that has been abandoned by the State.

Now, it is absolutely true that the State has no obligation, as they said during voir dire, to prove to you a motive for why a crime is committed. If you have a motive, it would certainly assist you in determining who committed a crime. But in this particular case, ladies and gentlemen, when you go back and when you deliberate, you have to ask yourselves, why did the State abandon the motive in this case. Why did they do that? I don't know. It's none of my business. I am here defending my client. But I do know that there has simply been no evidence whatsoever for you to consider that a motive for this crime may have been that he needed money. There is simply no evidence that he needed money. It's not before you. Why did they suggest that? I don't know. You can't ask them now.

But I can suggest to you that there are a lot of things about this case that you should question. The investigation, let's get past the statements that were taken. The lead investigator in this case, Detective Morris and Detective Major, after Mr. Montejo was arrested, put together a subpoena and requested the phone records be produced in this court, State's Exhibit Number Fifteen, phone records of

Jesse Montejo, of Lewis Ferrari, Jerry Moore, of

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several other people, and these records were returned in open court, all of these records. And I got these records and I looked at these records and I went over them and learned long ago that there were four telephone calls between Jesse Montejo and Mr. Ferrari. I asked Detective Morris and Detective Major, were you aware that there were communications prior to September 5th, 2002, between Montejo and Ferrari. No. No. You have got these records, did you even look at these records? No. It is a fact that there were four conversations? You have seen the record, you have heard the testimony. What were those conversations about? Mr. Montejo told you. When I asked the detectives about these conversations, "I don't know." Well, Detective Morris, Detective Major, could it be that in one of those conversations Mr. Ferrari invited Mr. Montejo to his house to meet with him? Response, It's possible, anything is possible. Wouldn't you expect that that would be something that an investigator in a case who asked for the records would look into that? He told you that he called me and had me come over to his house to talk to him about a job. Now why is that even important? It shows that there was communication. It corroborates the testimony of Jesse Montejo, that he had met with Mr. Ferrari, he had talked to him about a job, he had met him with a person by the name of D.P. and talked about a job. It corroborates

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those facts.

And what it does, ladies and gentlemen, it casts doubt upon whether or not there was an unauthorized entry into Mr. Ferrari's house. There was communication.

Further, further, we have got, if not hundreds, dozens of telephone conversations between Mr. Ferrari and other telephone numbers.

You all probably have cell phones. Some of you all might get your bills that show all of the phone numbers that you called and how long you talked to those people. After Mr. Montejo testified, and if you believe the State, this is The first time they heard about the possibility of another person by the name of D.P.. The one thing that I expected when I came to court today was after I rested that the State was going to call some witnesses who were going to say we went through that, say, would you look through every single telephone call that Mr. Ferrari received or Mr. Ferrari called, and here is who they are. There is no call to an unknown person in Orleans Parish on the West Bank. Remember, the State has the entirety of the Sheriffs Office. You heard Morris say, you help Me, partner, I have got the whole Sheriffs Office, that with the snap of a finger will help Me. The State had the entire Sheriffs Office, all of -- from yesterday when Mr. Montejo said about the calls and said about D.P., to check that phone list. I don't have the resources to do that. But they did, and they didn't put on any rebuttal evidence. Ask yourselves why. Wouldn't you like to know? Wouldn't you like to be convinced that all of those phone calls were to people: We know who they are, to the family members, to other locations? We don't know that now. We don't know if there is a call in there that somebody can't explain who it was.

And ladies and gentlemen, in this particular case, you will make a decision, but you will never know, because they didn't tell you. Is that a reasonable doubt? It suggests to me that the investigation in this case was over when he was arrested. Remember the hair that was found on the counter, was never tested. I made mention to Detective Major of a case that occurred twenty-five years ago in Jefferson Parish where a man was convicted --

BY MR. GRACIANETTE:

Objection, judge.

BY THE COURT:

I am going to allow some latitude.

Overrule.

BY MR. WILLIAMS:

A man was convicted, a man had an account of what happened, that somebody else broke into his house and killed his wife, and he said it was a stranger that did it. The jury didn't believe him. He was convicted. He lost everything. He was in Angola for twenty-five years and later it was found that it was a hair that wasn't tested. The hair was subsequently tested. And, after that testing, he was free, twenty-five years

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later when his life was over, because the hair wasn't tested. That man's name is Doug DeLossa (phonetic), and anybody in this courtroom is free to go check out to see if what I am saying is true, because it is true. So, and the reason that I bring that up is because on cross-examination, the State asked the detectives, have you ever heard of a case where evidence didn't get tested and it led to the identity of someone else. Well, believe me, folks, it happens. So we have a hair, which was not tested. The detective said, we ordered everything to be tested. Well, apparently they didn't follow up on that. What about the shirt, the green shirt that was in the van? Because as sure as I am standing here talking to you, if Jesse Montejo was the person that put that gun, more than likely Mr. Ferrari's own gun, up to his face and pulled the trigger, that there was going to be blood spatter all over him, all over his hands and all over his clothing. If he had gloves on, there would be blood splatter on those gloves. He had a green shirt. Detective Folse said he used an alternative light source and found no blood. What does that tell you? You may believe, well, that wasn't the shirt he was wearing. The gloves that the State claims that he had, that the detectives were able to get him to say that he had on, had no blood on them. What does that tell you? That tells you that perhaps he is not The person that pulled the trigger, that perhaps

We should give some credibility to what he said despite the fact that when he told you the story, it may have been hard for you to believe, being thrust upon you not having any notice of that story. But is it starting to make some sense? Because, ladies and gentlemen, of utmost importance for you to consider is, when you are listening to the evidence, you have to decide did The State prove its case beyond a reasonable doubt. And how do you do that? You consider the evidence and you consider the lack of evidence. One thing I would like to make an observation for your consideration. Mr. Gardner is as good as they get at cross examining, When Mr. Gardner cross-examined Mr. Montejo, first thing I noticed was his voice got a little bit louder than it has been, but that's one of the things that you do. I don't recollect that there was any question that Mr. Gardner asked Mr. Montejo where he stumped him, or he caught him in a lie, or he caught him double talking. With all due respect to the detectives in this case who testified, Hall, Morris and Major, if you will remember my cross-examination of them regarding the way they handled this case, I would respectfully submit to you that half of the questions that I asked them were answered in a deceptive manner, that there was not a yes or no answer, there was an answer that was self serving For them. And I think, if you will recollect the way the questions were answered, I think you are going to have to say he was absolutely more

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forthright in answering the questions and straightforward than the police officers were. Now, when I sit down in a few minutes, Mr. Gracianette is going to stand before you, and Mr. Gracianette is going to do a great job, and he is going to say things, and he is going to say this, and he is going to say why didn't the defense prove this, why didn't they do that, and I will suggest to you, we don't have to prove anything. He will suggest to you, did you hear from any witness that they saw a black man leaving the scene of their home, did you hear any witness. And there were several, and there were several others that the police interviewed that didn't testify. Did you hear any witness say they saw a black man leaving that home? No, you didn't.

Boy, that's, what a good argument that is, you know. How am I going to answer that? Well, I am going to answer it in advance, Did you hear any witness of those five or six that testified, and probably ten or twelve more who were there, say they saw him go in the house? How many of the witnesses, and we know he did that, did you hear any witness say they saw him come out of the house? What does that suggest to you? People didn't see everything. Does that mean that a person D.P. doesn't exist because nobody saw him? Nobody saw him. Mr. Montejo told you yesterday, and I expect Mr. Gracianette will address this and I think this is all I am going to say about

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Mr. Gracianette, because he is very capable and he will make good points to you. But one of the things he is going to say is, you heard Mr. Montejo say on tape, and you also heard him say yesterday, that he saw D.P. hit Mr. Ferrari in the back of the head and that caused Mr. Ferrari to fall forward on him and grab him and scratch him, which led to the DNA. Mr. Gracianette is going to tell you, you heard from the pathologist. He wasn't struck in the back of the head, that couldn't have happened, that's a lie. Now, if you believe that this whole entire story that Mr. Montejo told you is concocted and that he sat here carefully and he listened to what all the evidence was and he looked at it, and after seeing everything that he had, he took the stand and told a story in which he would be able to explain everything, why would he say something that we know couldn't have happened? If he is lying, why would he say that Mr. Ferrari was knocked into him by a blow to the back of the head, if he was lying about D.P., if he was lying about asking for an attorney from the police, why would he say that, if he is lying?

That may beg another question. Well, we know he wasn't hit in the head. How do we resolve that? Well, perhaps he wasn't hit with the gun. Perhaps he was slapped in the back of the head and knocked forward, which may not have caused a bruise. We don't know. But folks, guess what? You all have to know. Before you go

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into that jury room, deliberate and come back out here and render a verdict in this case, you have to be firmly convinced of what happened. And if there are questions that you have about what happened, every single one of those questions goes to him, goes to his favor.

If you think that he waited until the last possible minute to make up this story, you heard from a family friend, Mary Melancon, who told you that he told me that three weeks after it happened, that story. Perhaps, if you want to believe that she's lying, that's entirely up to you. You will have to decide. He could have put on his father and his mother to say that, and there is a likelihood that you will feel a father and mother will say anything to protect their Child, that's why I didn't call the father and mother, I called a family friend.

And you will have to remember, if you believe her, that she said that he told her exactly two-and-a-half years ago what she said yesterday, you have to believe, folks, that he told that story before there was any DNA. That DNA testing didn't come back until November of 2002. That's a fact, it's on the report. That report was rendered, I believe, if I am not mistaken, November 8th of 2002.

He tells his family and his family friend what happened, tells his lawyers, too, I might add. So don't think for one second, I would submit to you, that the evidence will keep you from believing that he made that story up at the

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last possible minute.

Now, I want to discuss, pretty much in closing, the investigation in this case. The police, Morris and Major and Hall, who you saw on the tape and who you heard in live testimony, told you that they took a statement. The law regarding the taking of a statement will be explained to you in determining what credibility that you will give a statement taken by law enforcement. You should consider whether the statement was made freely and voluntarily without the influence of fear, threat, intimidations, inducements or promises.

I am only going to show you one portion of this tape. To me it was the height of showing the intimidation level that was -- that existed during the course of the questioning of Mr. Montejo. It is when Detective Major -- lets see if it comes up.

(WHEREUPON, AT THIS TIME A PORTION

OF THE VIDEOTAPE WAS PLAYED FOR THE JURY).

BY MR. WILLIAMS CONTINUED:

What do you make of that, folks, "This is your last chance to say this was an accidental shooting?" They know, they knew that from the first moment they got this case that this was not an accidental shooting. "This is your last chance to say this was an accidental shooting."

That is intimidation. That is fear. That is just wrong.

Mr. Montejo told you that he had been threatened by D.P., that he or his family would

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be killed. So he is thinking about that when he is brought in by the cops. He's, he's being told by the cops that your partner, Jerry Moore, said you did it. He has been up, we know, sometime till in the morning of September the 7th, didn't get any sleep, brought back to the jail, checked back out at three-thirty. We know he is being called a liar. We know for a fact that he asked for a lawyer. It's on the tape. And as soon as he asked for the lawyer, Morris tells him, then you are under -- I'm going to arrest you for first degree murder. What a nice thing to say to someone who wants to exercise their constitutional rights to have legal counsel. Oh, you want a lawyer, then you are under arrest. That is improper, but they did it. And then he is, Wait,hold on,let me talk some more. But guess what, the tape is off for a while. The tape is off for the first two hours and seventeen minutes. When you go back and discuss that, ask yourselves, why on earth is the tape off? The detectives' explanation, Well, we were just talking about preliminary things, he hadn't really said anything.

So, let us see. If you are going to tape one part of it, tape the whole thing. Don't turn off the tape after the man asked for a lawyer and then turn it back on, let's see the whole thing. What explanation could there possibly be for turning off the tape other than there is something they don't want you to see? What other explanation could there be? There is none.

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Something that occurred to me, why after they have gotten this statements from him -- and, of course, remember, folks, Mr. Gracianette is not going to play this part. Remember the part of the statement, after he had asked for a lawyer, where he says, you are not going to believe me when I tell you what happened, and they say, yeah, we'll believe you, and he tells, begin to tell what he told on the witness stand, and then they throw their hands, oh, that's bull, we are out of here, it's over. They didn't want to hear that. So there is an attempt by him, they don't want to hear that. They don't want to -- they want to hear what they believe to be the truth.

Why would those officers talk to him about manslaughter? This wasn't a manslaughter. I am not going to stand before you, say, ladies and gentlemen, the most this case was, this was never a manslaughter. Why are they reading him what manslaughter is?

All of that, ladies and gentlemen, leads, those sorts of things, the intimidation, the threats, the fact that he hasn't slept, hasn't eaten -- that piece of pizza that was given to him was never eaten, that could lead to what's known as a "false confession." And there were several false confessions.

And the police, if they truly believed what he was saying, why do they bring him out and keep looking for that gun? Because they know if he leads them to where that gun is or any piece of

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evidence, then they have got the gun, then they've got something to positively say he threw that gun away. And he told you he took them to different places. He just wanted to get it over with.

He lied to them. They lied to him. Which is better? Is it better for law enforcement to lie, or is it better for a defendant to lie? Who knows. Depends upon the circumstances.

But they're lying, by their own admission. The entirety of their interrogation is based upon lies.

Remember the example I gave some, some of you may remember, when I talked to you about a setting when an employee brings in -- an employer brings in an employee to question them about a theft, and the employer says, Look, you know, we know you did it, we just want you to admit you did it, even though in my hypothetical situation, the employee had actually not done it, just admit to us that you did it and go back to your job, and, okay, and then they are arrested and prosecuted, okay. A false statement. That's the sort of intimidating tactics that will lead to false statements.

And ladies and gentlemen, just about every single thing that he said in those statements, later, it didn't happen, it couldn't have happened. We know it didn't happen. The detectives, the lead detective in this case, with all due respect to him, and I understand the difficulty of the job they have, he crafts a

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fifty-four some-odd page report and then there's reference to a statement for three pages and it has to be retracted, it's a typo.

It is amazing to me that this investigation had so many typos. Detective Hall, I have got the wrong day. Detective Morris, I have got the wrong time, which brings us to State's Exhibit Number 76, the so-called apology letter. This to me, as someone who pretty much my entire legal career has been in the criminal justice system, this jumped out at me more than anything else that I saw. In this letter, at the very bottom, where he begs forgiveness -- and he tells you the police told him what to say -- "I was going for a simple burglary."

I introduced Defendant's Exhibit Number 6, which is page 42 of the Louisiana Code of Criminal Procedure, has all the laws regarding procedure, the statutory laws. Title 14:62 is simple burglary. Now, folks, the judge told you none of these things you can take back. These written items, you can't take the tape back. So I am going to kind of remind you of this again. You all looked at it yesterday. You know, if somebody didn't know too much about law enforcement. You know, certain crimes in Louisiana have the preface "simple". There's simple burglary, there is simple arson, there is simple robbery, you know. Those are pretty bad crimes, you know. Why the term "simple"? There's nothing simple about a burglary. But that's the way the legislature drafted it. It is

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Not simple, like it's easy. It is simple because that's what the statute say. Do you think he reviewed the Louisiana Code of Criminal Procedure before he wrote that letter? Where did simple burglary come from? You know what? There is probably not one single person here, including the cops that took this statement, that knew what happened, that don't believe that that information was supplied to him. How else can you explain it? He writes simple burglary, somebody told him simple burglary. Somebody told him a lot of different things. There is no other way to explain that, ladies and gentlemen.

If you take that one fact, and I don't expect that Mr. Gracianette is going to get up here and challenge this at all, like he did when he tried to say -- to have Hall say, Well, you mean, simple, like it was an easy. Nobody, other than a child, is going to think, but that is not what happened.

So, folks, I will leave you with this:

If you believe that simple burglary was provided to him by the police, then take that point in time and go backwards with it and think what else did they say and what else did they do in this case. Was that proper? It was absolutely improper. And proof of that is that they denied doing it, but they did it. There's simply, no -- folks, when you go back, you know, at some point talk about what I am suggesting to you. And if they did that, is it so hard to

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believe that he told them he wanted a lawyer, they said you get a lawyer later, that they intimidated him, they suggested what to say. Where is the evidence of blood spatter on anything that he had? They did search warrants and everyplace where they thought that he was, where is one item of clothing that has any blood on it whatsoever? There's not one. I have probably missed things that I thought were important, but that's okay. I am sure that there is some of you that will recollect some things that may give you a problem. And I will leave you with this, ladies and gentlemen: There is no more horrific crime that can be committed than occurred to Mr. Ferrari. His family will have to live with that. And to his family, I, I cannot say how sorry I am that that happened. And believe me when I say that. But your job, as jurors, will be to take the emotion out of this case, and your mind, and I am going to submit to you that your job as jurors will be to decide this case dispassionately based upon the evidence that you have been submitted. And, ladies and gentlemen, if you are able to do that, and you look at this case subjectively, while at first it may have seem, this is a dead solid lie, conviction for the State, when you look at all the evidence that's been presented to you, the testimony that you have heard, if you will consider the suggestions that I have made to you about the evidence and the lack of evidence, ladies and gentlemen, I

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will submit to you that you must have a reasonable doubt about what happened, and if you have a reasonable doubt about what happened, there's only one conclusion that you can reach, there's only one. It may be, at this point in time, difficult for you to concede that somebody, you know, won't have to pay for that crime, that terrible crime. But I ask you, as best you humanly can, to set that aside and decide this case upon the evidence that you heard.

And I will submit to you, when you consider what I have said, you look the things that we have talked about, that that has to rise to the level of a reasonable doubt about what really happened, you have the right to accept or reject as his story, but when you listen to his account of what happened, and you consider the State's theory of its case, are you really sure what happened? And if you're not firmly convinced of the truth of these charges, you are duty bound to return a verdict of not guilty. Thank you very much, ladies and gentlemen.

BY MR. GRACIANETTE:

Good morning. This is my opportunity to address some of the issues raised by Mr. Williams in his closing arguments and to tell you what really happened in this case. And what I will do is take the issues that he raised and go back from the last time he started. The last point that Mr. Williams made to you was that the finest of St. Tammany Parish police officers lied, deceived you, because they coerced an apology letter from the defendant.

Now, you know that is not to be true, but what he claims is the basis for that conclusion is the reference in this letter to the term "simple burglary" and that admission by Mr. Montejo. You believe that? Because if you think the police officers are trying to extract a confession out of him to fit their case, you think they would do a better job of it. Because, you know, under the law, State of Louisiana, for the crime of first degree murder to be committed, it doesn't take place during the commission of a simple burglary. It requires the commission of an aggravated burglary. That's the law. And if the police officers really wanted to build their case and they really wanted to make this confession a good one, they would have included not simple burglary, which doesn't fit the crime of first degree murder, they would have said, Jesse, put in aggravated burglary and armed robbery.

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TWENTY-SECOND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA

STATE OF LOUISIANA
VERSUS NUMBER: 355706
JESSE JAY MONTEJO

* *

TRANSCRIPT OF PROCEEDINGS taken before the Honorable Donald M. Fendlason, Judge Presiding, Division "H", Twenty-Second Judicial District Court, Parish of St. Tammany, State Louisiana, on Thursday, March 10, 2005, in Covington, Louisiana.

APPEARANCES:

RONNIE GRACIANETTE, ESQ.
(ASSISTANT DISTRICT ATTORNEY)

SCOTT GARDNER, ESQ.
(ASSISTANT DISTRICT ATTORNEY)

JAMES C. WILLIAMS, JR., ESQ.
(ATTORNEY FOR JESSE MONTEJO)

* * * *

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BY MR. GARDNER:

May it please the Court. We called

you hear to make this choice. And I understood nine days ago, nine months ago, the choice that I would ask 12 people to make. I never took this job lightly. I don't take the choice lightly. When you end a life, you make a choice. And that choice has repercussions. We think of the men down

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in a fox hole. A grenade gets tossed in. And they try to cover each other up. Try to scream. Some may be saved. Some may be spared. But some may die. But they are all harmed and injured. And so this family tries to cover up each other. Tries to help each other out. But they are all harmed and injured. Rather than spend a lot of time in argument, what I hope to do is spend a few minutes now with the framework in which you make this decision. You will maybe begin now to use those aggravating and mitigating circumstances in the way that the judge will instruct you to do so. Remember, you must find one aggravating circumstance. We have alleged two. We are urging you to find that armed robbery is, in fact, an aggravating circumstance. That aggravated burglary is, in fact, an aggravated circumstance. You must consider all mitigation. What you might do now is think, rather than having somebody tell you, you think to your self what a mitigating circumstances apply based upon what you have seen. No significant prior criminal activity. Was the offense committed when the offender was under the influence of extreme mental or emotional disturbance? Or did Jesse Montejo want new speakers? Was the offense committed while he was

under the domination or control of another person? Did anybody believe there was moral justification or extenuation for this armed robbery, aggravated burglary, and murdering a man who had willingly given up what it was you came to seize? You find that that applies. Jesse Montejo is young. I'll grant you that. And in his 23 years. You have seen his accomplishments. He was a principal. His participation was not minor. When you, when your foreperson decides on a verdict, you have to write down what statutory aggravating circumstances that you find. We turn now to the nature of the offense. I suppose it's hard now for all of us in this air conditioned and safe courtroom to think back to when you might have been truly afraid for your life. In order to get a feel for the nature of the offense, to know that somebody else has a gun pointed, as Lou Ferrari clearly knew. For him to consider over and over what is it can I say, what is it can I do, to preserve my life and to go on to another day. Anything that you would not give up? Certainly not. So, to give up his property willingly, and then the defendant chose to execute him because he was the only witness left.

The character or propensity of the

defendant is a focus for you. What does character mean? When you think of a person's character, you think of a person who has a reputation, takes responsibility for their actions. Think of a character as a person who cares. And what you have seen is, in the character and the propensities of the defendant, a defendant who is abjectly without the character to care for his victim. You saw his willingness to accuse others. Apparently to testify.

We then turn to the impact on the victim's family, based upon the nature of the offense. Certainly, you heard from Nancy. She gave you a five minute version. Certainly each of us are intelligent enough to know that that doesn't express how it is each day for that family. But all of them concur that

Lou Ferrari was a kind and generous man. You heard that he spent much of his time working. And he spent the rest of his time with his family, that he cared for a brother who was slow, cared for a mother who was old.

I guess two of the things that come to mind when you think about Lou Ferrari, is that for all of us, there's a certain amount of hustle and bustle to our lives. We are hustling children from one place to another. But eventually, all of us get to

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a point where those things are not moving at light speed.

Vera Ferrari's life slows down.

Vera Ferrari's life consists of a son who is slow and a some Lou, who sees her, takes care of her. And in those slower moments, as she gets older, the day stretches on. The day doesn't just fly by. So for her to lose a son, instead of those slow moments each day, in anticipation of seeing him, they are just long slow days that is not going to end.

For Pat Ferrari, who is not one to come here and whine. She is a strong person. But the reality is, is that she met Lou as a childhood sweetheart. From age 17 until now, from age 17 to September 5, of 2002, each day was filled with his presence. You become accustom to that being the case. You become accustom to smell the Royal Copenhagen. You become accustom to waking up and somebody is not in the bed, it's because they have gotten up to make coffee.

Perhaps all of us have been there where something awful is going on. Somebody has died, somebody is sick. You recall when you first wake up, as Pat does, that you don't remember. When you wake up, you are used to everything being fine. Until you remember every morning. Oh, wait. Oh, wait. I was asleep. And

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now I'm awake. And now my husband is murdered. And all that will happen is I will go back to sleep tonight, and I will wake up. And my husband will still be murdered.

Don't be overly concerned with one of the scenarios provided by the defendant with regards to burglary. You may have already gone through this in your mind when considering the nature of these events. You may have thought about the time. The time may have already dawned on you.

You may have already said, you know, between 4:15 and 4:30, he's in that house. And he leaves at 5:30. And it may have already dawned on you how long a period of time we are talking about. We already know that one portion of what was taking place was firing that gun in to a sofa in order to intimidate, scare, frighten, cower, Lou Ferrari. We know that one portion of that event included shooting him in the side. We know that that involved a certain amount of pain, a certain amount of fright, a certain amount of, you know, I didn't know whether or not I was going to make it. I think maybe I will. I can give up my car keys. I can give up the money. I can promise to go to the ATM. I can do anything. And to be shot. That's

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got to be a wake up call. And that has got to provide the type of desperation in which a man will give up anything. So we know there's no reason to execute Lou Ferrari. And that there was plenty of time for the defendant to make his choice. There's no rush of people coming in. Certainly no one heard that warning shot. So that a choice to execute Lou Ferrari, which was made by that man sitting right there, clearly you understand that choice. We know this is a difficult choice for you. We ask that you follow the law and evaluate this as the judge will ask you to do. Aggravating circumstances, mitigating circumstances, nature of the offense, and impact on the victim's family. And when you do, and when you do, we ask that you return with a verdict that you told us you could consider. Each of you told us that you could consider it if we proved the case. And that's what we are asking that you do now. We are asking that you consider the death penalty as appropriate for this offense. And I thank you.

* * * *

PETITIONER'S
BRIEF

111 ④ No. 07-1529

Supreme Court, U.S.
FILED
NOV 17 2008
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

JESSE JAY MONTEJO,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF FOR PETITIONER

JELPI P. PICOU
G. BEN COHEN
ROBERT J. SMITH
THE CAPITAL APPEALS PROJECT
636 BARONNE STREET
NEW ORLEANS, LA 70113
(504) 529-5955

DONALD B. VERRILLI, JR.
Counsel of Record
IAN HEATH GERSHENGORN
KATHERINE A. FALLOW
MATTHEW S. HELLMAN
THOMAS H. KIM
ADAM G. UNIKOWSKY*
CAROLINE D. LOPEZ*
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001
(202) 639-6000

*Not admitted in DC; supervised by principals of the firm

00500000465A19

QUESTION PRESENTED

When an indigent defendant's right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to "accept" the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 24.1(b), the following list identifies all of the parties before the Supreme Court of Louisiana.

Jesse Jay Montejo was the defendant and appellant in the courts below. The respondent is the State of Louisiana, the prosecutor and appellee in the courts below.

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OPINION BELOW

The opinion of the Louisiana Supreme Court is reported at 974 So. 2d 1238 (La. 2008), and is reprinted in the Appendix at Pet. App. 1a-59a.

JURISDICTION

The opinion of the Louisiana Supreme Court was entered on January 16, 2008. That court denied Montejo's timely petition for rehearing on March 7, 2008. The petition for a writ of certiorari was filed on June 5, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI. The Sixth Amendment is applicable to the states through the Fourteenth Amendment.

STATEMENT OF THE CASE

A. Background

Arrest & Pre-Appointment Interrogation

On the afternoon of September 6, 2002, Jesse Jay Montejo was taken into custody by Gretna, Louisiana police officers for questioning in connection with the murder of Lewis Ferrari. Mr. Ferrari, the proprietor of a local dry cleaning operation in Slidell, Louisiana, had been shot to death following an apparent robbery in his home on the previous day. The victim's family suspected Jerry Moore, a local mechanic specializing in repair of dry cleaning equipment, who had a contentious relationship with Mr. Ferrari and who would have known that Mr. Ferrari was likely to be carrying a significant amount of cash with him on the evening of September 5th. Pet. App. 3a-4a; R. 2402-06 (Trial Tr. Mar. 6, 2005); R. 2423-24, 2427 (Trial Tr. Mar. 6, 2005). Montejo was picked up for questioning because he was an acquaintance of Moore who had provided transportation to Moore after Moore's driver's license was revoked. R. 2552-54 (Trial Tr. Mar. 7, 2005).

Montejo was first taken to the Gretna police station. According to Montejo's trial testimony, he was placed in a holding cell and handcuffed to the wall. JA 227. He asked to leave and was told he could not. *Id.* at 227-28. He then asked for a lawyer. In response, the detaining officer told Montejo that he "wouldn't advise that, because . . . we need to question you about some serious matters." *Id.* at 228. When Montejo asked whether he was entitled to have a lawyer present, he was told "Yes, but we wouldn't really recommend that." *Id.*

Upon learning of Montejo's detention in Gretna, Detectives Wade Major and Johnny Morse of the St. Tammany Parish Sheriff's Office went to the Gretna police station at approximately 4 p.m. on the afternoon of the 6th. Pet. App. 9a-10a & n.19. Montejo was transported to the Slidell station of the St. Tammany Parish Sheriff's Office. Pet. App. 9a-10a. Detectives Major and Morse placed Montejo in a small room and began interrogating him at 4:30 p.m. Pet. App. 10a n.20. They gave Montejo *Miranda* warnings and obtained a waiver from him at 4:38 p.m. *Id.* They then interrogated him until approximately midnight. *Id.*

During that interrogation, as Detective Major later admitted at trial, the detectives repeatedly lied to Montejo to get him to confess. R. 2358 (Trial Tr. Mar. 6, 2005). They also deprived him of sleep, a tactic Detective Major acknowledged could cause a suspect to "tell you whatever you want to hear." R. 2362 (Trial Tr. Mar. 6, 2005).[1]

More than five hours into the interrogation (throughout which Montejo had denied shooting the victim), the detectives pressed Montejo for admissions in increasingly aggressive tones:

> Q: (Shouting) Are you sorry for shooting that man?
>
> A. I didn't shoot him.
>
> Q: Yes you did.
>
> A: I did - not - shoot - that - man.

State's Ex. 14-B (DVD version of the 1st interview of Jesse J. Montejo).

Immediately after that exchange (at approximately 10 p.m.), Montejo invoked his right to counsel, stating unambiguously: "I did not kill that man, I did not break in, I did not steal anything. I would like to answer no more questions unless I'm in front of a lawyer." *Id.*

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[1] As Montejo explained, as a result of the lengthy interrogation, "[I was] so tired . . . [that] I was delirious . . . . [E]ventually I was just like, Okay, I did it, I did the crime." JA 233-34.

Instead of ending the interrogation, the detectives pressed Montejo to revoke his request for counsel. Detective Morse told Montejo, "You are under arrest for first degree murder," and then left the interrogation room. Pet. App. 14a. Detective Major indicated to Montejo that he had forfeited any chance of leniency by asking for the assistance of counsel:

> Detective Major: . . . Dude, you don't want to talk to us no more, you want a lawyer, right? I trusted you and you let me down.
>
> Montejo: No, come here, come here.
>
> Detective Major: No, no, I can't.
>
> Montejo: No, come here.
>
> Detective Major: No you've asked for an attorney, and you are getting your charge. And the shame of it is . . .

State's Ex. 14-B (DVD version of the 1st interview of Jesse J. Montejo); Pet App. 15a. Approximately 10 minutes later, Montejo — "visibly upset" and sobbing — revoked his request for counsel. Pet. App. 16a & n.35. The following exchange ensued:

> Detective Morse: Did you of your own free will and accord come to us and tell us that you wish to waive your right to an attorney and you wish to make a statement?
>
> Montejo: What am I doing. What am I doing. What am I doing (*crying and clutching his face*

> *in his hands*). Am I going to sit in prison for life.

State's Ex. 17-A (DVD version of the 2d interview of Jesse J. Montejo).

After the interrogation resumed, Montejo described a new version of the crime in which he implicated himself, saying that he shot the victim during a "botched burglary." Pet. App. 16a. When the police probed this account, he retracted this version of events and insisted that he would not "take the rap" for something that he did not do. State's Ex. 17-A (DVD version of the 2d interview with Jesse J. Montejo). After the retraction, the detectives ended the interrogation. *Id.* They booked Montejo on a first degree murder charge shortly after midnight, and placed him in a holding cell. Three hours later, they returned to Montejo's cell, checked him out of jail, and transported him to the Covington station of the St. Tammany Parish Sheriff's Office, where they questioned him for an additional hour. Pet. App. 9a n.16; R. 2350 (Trial Tr. Mar. 6, 2005); R. 2706-07, 2730 (Trial Tr. Mar. 8, 2005)

Some but not all of the interrogations on September 6th and 7th were videotaped. Although the interrogation commenced at 4:30 p.m., the videotaping did not begin until 7 p.m. Pet. App. 10a n.20. The recorded portions of the interrogation between 7 p.m. and 10 p.m. show Montejo first denying any involvement in the crime, and eventually stating that he was at the victim's house with an unidentified black male, known only as D.P., who robbed and shot the victim. Pet. App. 18a-20a;

State's Ex. 17-A (DVD version of 2d interview of Jesse J. Montejo). The interrogating detectives turned off the videotape at 10 p.m., just after Montejo unambiguously asked for the assistance of counsel. Pet. App. 15a. They resumed videotaping approximately 10 minutes later, beginning with Detective Morse's question to a weeping and agitated Montejo regarding his purported decision to change his mind and waive the assistance of counsel. Pet. App. 16a & n.35. As a result, there is no videotape evidence of the exchange between the detectives and Montejo that prompted him to revoke his request for counsel. Pet. App. 15a. The officers also did not videotape the first 45 minutes of their interrogation of Montejo at the Covington station at approximately 3 a.m. on September 7th. Pet. App. 10a n.20.

Appointment of Counsel & Pretrial Interrogation

On the morning of September 10, 2002 — four days after Montejo was detained and first interrogated — officers from the St. Tammany Parish Sheriff's Office brought Montejo before a St. Tammany Parish judge for a mandatory initial hearing, which Louisiana law dictates must take place within 72 hours of a defendant's arrest.[2] A

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[2] Article 230.1, Section A of the Louisiana Code of Criminal Procedure requires the following:

> The sheriff or law enforcement officer having custody of an arrested person shall bring him promptly, and in any case within seventy-two hours from the time of the arrest, before a judge for the purpose of appointment of counsel. . . . However, upon a showing that the defendant is incapacitated, unconscious, or otherwise physically or mentally unable to appear in court within seventy-two hours, then the defendant's presence is

representative of the Sheriff's office attended the hearing. R. 2583 (Trial Tr. Mar. 7, 2005).[3] The minute record (which is the only record of the hearing) attests that the court denied Montejo bail and appointed him counsel through the Office of the Indigent Defender. Pet. App. 63a-64a. Nothing in the record indicates that the court asked Montejo whether he had "accepted" the lawyer appointed to represent him. Nor does the record indicate that the court otherwise notified him that the scope of his protection under the Sixth Amendment might depend on whether he stated that he affirmatively accepted the appointment.

Upon completion of the 72-hour hearing on September 10th, Montejo was brought back to the St. Tammany Parish Sheriff's Office. Shortly after he returned to the office, Detectives Hall and Galloway of the Sheriff's Office visited Montejo to commence another interrogation. Pet. App. 23a n.49. The detectives told Montejo that they wanted him to accompany them on a car ride so that he could show them where he discarded the gun that was used to

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> waived by law, and a judge shall appoint counsel to represent the defendant within seventy-two hours from the time of arrest.

La. Code Crim. Proc. Ann. art. 230.1(A).

[3] At trial, Detective Morse acknowledged that a representative of the Sheriff's Office was present at the hearing. *Id.* It is unclear from the subsequent colloquy who represented the office, but it was established that Rodney Strain was the sheriff of St. Tammany Parish on the date of the hearing. *Id.* The minute record also notes that Sheriff Strain was present. Pet. App. 63a-64a.

shoot Mr. Ferrari. In response, Montejo told them that he was represented by counsel:

> They asked me if I would come with them to go clear up where I threw the gun at. So I said, Well, and I don't, I don't, I don't really want to go with you. He said, Do you have a lawyer? I said, yeah, I got a lawyer appointed to me.

Pet. App. 49a; JA 242.

Rather than verify whether this statement was true, the detectives pushed Montejo to allow an uncounseled interrogation, as they had done when Montejo asked for the assistance of counsel during his pre-appointment interrogations. *See supra* 3-4. In this instance, they told Montejo that he did not have a lawyer. As Montejo testified:

> He said, No, no, you don't. I said, Yeah, I think I got a lawyer appointed to me, and I guess that's where I messed up, when I said I think I got a lawyer appointed to me. He said, No, you don't, He said, I checked, you don't have a lawyer appointed to you.

Pet. App. 49a; JA 242.

The detectives then gave Montejo *Miranda* warnings. After he agreed to proceed, the detectives took Montejo from the St. Tammany Parish Sheriff's Office in their car. Pet. App. at 21a. Montejo's appointed counsel arrived at the Sheriff's Office to confer with his client shortly after the detectives took Montejo away. JA 180-81. Thus, Montejo's lawyer did not have the opportunity to consult with his client before Montejo was interrogated on September 10th. JA 179-81.

With his lawyer unavailable to him, Montejo was pressured during the car ride with Detectives Hall and Galloway to write a letter — with a pen and paper the detectives gave him — to the victim's wife expressing remorse for his involvement in the murder. Pet. App. 20a-22a; *id.* at 22a n.49 (setting out text of letter); State's Ex. 76 (letter). At trial, Montejo testified that the detectives dictated much of the letter's content. Pet. App. 22a n.49; JA 246-49. The letter, for example, contained the term "simple burglary" — a classification of burglary specific to the state of Louisiana that was unlikely to be a term known to a layperson. Pet. App. 22a n.48; R. 2736-37 (Trial Tr. Mar. 8, 2005). Montejo testified that he did not know what simple burglary was at the time that he wrote the letter. JA 247. The Louisiana Supreme Court noted Montejo's testimony that Detective Galloway "suggested" most of the letter, and noted further that Detective Galloway did not testify at trial. Pet. App. 23a n.49.

After Montejo finished the letter to the victim's spouse, the detectives ended the car ride. Pet. App. 20a n.44. When they returned to the St. Tammany Parish Sheriff's Office, they found Montejo's lawyer waiting for them. JA 179-81. According to Detective Hall, the "pagers were going off and the cell phones were going off and we were being directed back to the investigation's bureau to meet with a public defender." JA 180. Detective Hall explained that when he met with the public defender, the attorney was "pretty upset that I had been out with Montejo that afternoon, and he started getting on me pretty intently about having been retained as [Montejo's] counsel." JA 180-81.

B. Proceedings Below

The Trial

On October 24, 2002, Montejo was indicted, along with Jerry Moore, on one count of capital murder. R. 0123. At a pretrial suppression hearing, defense counsel sought to have the letter Montejo wrote during the police-initiated interrogation on September 10, 2002 excluded from evidence on the ground that it was obtained in violation of the Sixth Amendment. The trial court ruled it to be admissible. Pet. App. 21a-22a.

The guilt phase of Montejo's trial began on March 5, 2005 and lasted four days. R. 2234. At trial, there was relatively little physical evidence that Montejo had killed Mr. Ferrari. Neither the murder weapon nor the money bag Mr. Ferrari had on the day of the murder were ever found. Pet. App. 20a n.44; *id.* 21a n.45. Nor did the State find any traces of blood spatter in Montejo's van or on any article of his clothing. *Id.* 8a-9a. No witness saw Montejo commit the crime. Although DNA evidence matching Montejo was found under the victim's fingernails, that evidence was consistent with Montejo's explanation at trial that he was involved in an altercation with the victim before the fatal shooting. JA 209-11.

Moreover, the police failed to follow leads that could have confirmed Montejo's account of the events. They did not trace the victim's phone records to determine whether any outgoing calls had been made to D.P., the man identified by Montejo as the shooter and someone to whom Mr. Ferrari had introduced Montejo several days before the murder. JA 195-98, 268-70. Nor did they attempt forensics on a hair sample found at the scene of the crime, even though the crime laboratory detective at the scene admitted that he could not identify the race or gender of the owner of the hair without further testing and that, "if [he] had been the lead investigator," he might have found it helpful to do follow-up on the hair. R. 2542-43 (Trial Tr. Mar. 7, 2005), *see also* JA 270-72; R. 2542-43 (Trial Tr. Mar. 7, 2005).

Consequently, Montejo's "confession" letter to the victim's spouse was critical to the prosecution's case. The letter was admitted during Detective Hall's trial testimony, Pet. App. 21a-22a, and the prosecution made repeated references to it throughout the trial. JA 166, 290-91. In the opening statement, for example, the prosecution focused on the letter's importance as an admission of guilt. After describing the various places that Montejo went with the police during the September 10, 2002 interrogation, the prosecution stated:

> And most importantly, on the way back in, I'm so sorry.
>
> The defendant executes, and asks, can I have a pen and some paper, I want to write a letter to this lady and tell her I'm sorry, I am so sorry. And the defendant proceeds in his own handwriting to write a heartfelt letter

> describing how it was all an accident, it shouldn't have happened this way and he feels sorry.

JA 166. The prosecution also used the letter to impeach Mary Melancon, a character witness for Montejo and the only witness called by the defense. Ms. Melancon stated that she "didn't even know that [the letter] existed," JA 252, at which point the prosecution showed the letter to the jury, R. 2819-20 (Trial Tr. Mar. 8, 2005). The prosecution also focused the jury's attention on the letter during the rebuttal phase of closing argument, just prior to the jury's retiring to deliberate. JA 290-91.

The jury returned a verdict of guilty of first degree murder. R. 2913 (Trial Tr. Mar. 8, 2005). The penalty phase of the trial began the following morning and was completed before noon, with the defense case comprising a total of four pages of transcript. R. 2938-42 (Trial Tr. Mar. 10, 2005). The jury returned with a sentence of death, R. 2972-73 (Trial Tr. Mar. 10, 2005), and the trial court formally sentenced Montejo to death on May 13, 2005, Pet. App. 69a; R. 2980-82 (Trial Tr. May 13, 2005).[4]

The Appeal

Montejo appealed to the Louisiana Supreme Court, contending (among other things) that statements made during the interrogation of him by the St. Tammany Parish Sheriff's Office detectives on the evening of September 6th and early morning

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[4] Montejo's co-defendant was tried and convicted separately, and was sentenced to life imprisonment without possibility of parole. Pet. App. 1a n.1.

September 7th after he requested counsel were obtained in violation of the Fifth Amendment, Appellant's Br. at 9-20, *available at* 2007 WL 4560160, and that the introduction of the letter written during the September 10th car ride after his right to counsel had attached and he had been appointed counsel violated the Sixth Amendment, *id.* at 21.

With respect to the Sixth Amendment claim, Montejo contended that the police-initiated interrogation on September 10th violated the rule of *Michigan v. Jackson*, 475 U.S. 625 (1986). Furthermore, because Montejo had informed the detectives who approached him on September 10th that he had a lawyer, Appellant's Br. at 25, and because the interrogating officers responded falsely that no lawyer had been appointed to represent him, a valid waiver of his Sixth Amendment rights could not possibly have occurred. *Id.* at 24-25. Accordingly, the introduction at trial of the letter resulting from the September 10 interrogation violated his Sixth Amendment rights. *Id.* at 27.

On January 16, 2008, the Louisiana Supreme Court affirmed. Pet. App. 58a-59a. The court recognized that the police tactics used during the September 6th and 7th interrogations presented a close question under the Fifth Amendment. Montejo's request for counsel was "unequivocal and unambiguous." Pet. App. 32a. The court also found that Detective Major's efforts to pressure Montejo to revoke that request "merit[ed] close scrutiny" because they could be construed as an attempt to elicit a response. *Id.* at 34a. The court noted further that the defendant was visibly distraught and tired throughout the numerous hours of interrogation. *Id.* at 40a. Nevertheless, the court concluded that Montejo's agreement to resume interrogation was a valid waiver. *Id.* at 41a-42a.

Turning to the Sixth Amendment issue, the court acknowledged that Montejo's "right to counsel attached at the 72-hour hearing held on the morning of September 10, 2002, at which time indigent defense counsel was appointed to represent him." *Id.* at 47a. The court also acknowledged that the minute entry memorializing the hearing (no transcript of the proceeding was made) indicated unambiguously that the court had appointed counsel to represent Montejo. *Id.* The court noted, however, that the minute entry "[did] not show a response by the defendant," and that "[t]he State allege[d] that the defendant simply stood mute at this hearing and defendant does not allege that he made any statement at this hearing asserting his right to counsel." *Id.* The court then ruled that "something more than the mere mute acquiescence in the appointment of counsel is necessary" to trigger *Michigan v. Jackson*. *Id.* (internal quotation marks omitted). In other words, in the view of the Louisiana Supreme Court, although Montejo's "right to counsel had attached, he did not assert his right to counsel such that the prophylactic rule of *Michigan v. Jackson* would invalidate any waiver he would later make." *Id.* In reaching that result, the Louisiana Supreme Court gave no apparent consideration to Montejo's statements to the detectives seeking to interrogate him that: "I don't really want to go with you," and "yeah, I got a lawyer appointed to me." Pet. App. 49a.

Finally, the court held that Montejo had waived his Sixth Amendment rights in response to police-initiated interrogation, Pet. App. 51a, notwithstanding that Montejo maintained that the interrogating officers had falsely informed him that no lawyer had been appointed to represent him, Pet. App. 49a n. 69, thus creating the impression that he had no lawyer to consult prior to the interrogation.

SUMMARY OF ARGUMENT

The Louisiana Supreme Court's decision to deny Montejo the Sixth Amendment protections of *Michigan v. Jackson* lacks any grounding in common sense or this Court's precedents. The Louisiana Supreme Court conceded that Montejo's right to counsel had attached and that Montejo had been appointed counsel at the 72-hour hearing, the very purpose of which is to appoint counsel to indigent defendants. Yet almost immediately after he was appointed counsel — and before his lawyer even had a chance to meet him — the police initiated a custodial interrogation. Because Montejo had a lawyer when the police initiated their interrogation, that interrogation was a plain violation of Montejo's Sixth Amendment rights, and the resulting incriminating statements should never have been admitted at trial. *Michigan v. Harvey*, 494 U.S. 344, 352 (1990); *Patterson v. Illinois*, 487 U.S. 385, 390 n.3 (1988); *Jackson*, 475 U.S. 625; *McNeil v. Wisconsin*, 501 U.S. 171, 179 (1991). Accordingly, Montejo's conviction and capital sentence cannot stand.

The Louisiana Supreme Court concluded that Montejo could not claim the protection of *Jackson* because Montejo had not made an affirmative statement "accepting" counsel during the appointment hearing. That reading of *Jackson* is illogical and contrary to governing precedent. There is no basis for equating a defendant's silence during the appointment of counsel with a defendant's decision to decline that counsel; to the contrary, the most logical and reasonable inference is that a defendant does not think that it is necessary to do anything else to secure the assistance of the attorney that has just been appointed to him. That is particularly the case where, as here, there is no indication that the defendant was informed that he was required to "affirmatively accept" the appointment of counsel or that he would lose the protections of the Sixth Amendment if he failed to do so.

Moreover, the Louisiana Supreme Court's approach cannot be reconciled with this Court's Sixth Amendment decisions, which make clear that once a defendant "has" or "obtains" an attorney, the rule of *Jackson* applies and the police are barred from initiating uncounseled interrogations. *Harvey*, 494 U.S. at 352; *Patterson*, 487 U.S. at 290 n.3. The Court's decisions uniformly presuppose that a defendant who has been appointed counsel has an attorney for purposes of the Sixth Amendment, and the Court has never suggested that a defendant who remains silent during an appointment hearing forfeits the safeguards designed to protect the attorney-client relationship. Indeed, this Court has never held that an affirmative affirmation of counsel is necessary to enjoy the protections of the Sixth Amendment, and it even has suggested that those protections apply where a defendant's family members — *unbeknownst* to the defendant — obtain counsel on his behalf. *See Moran v. Burbine*, 475 U.S. 412, 428 (1986); *Patterson*, 487 U.S. at 297 n.9.

Finally, the Louisiana Supreme Court's approach is unfair and unworkable. The "affirmative acceptance" requirement would penalize those defendants who rely on a court's appointment of counsel as an affirmation of their right to counsel. The approach would also create intractable problems of administration, as it would make the protections of the Sixth Amendment turn on a highly-subjective and context-sensitive analysis of the defendant's statements and gestures (as well as the vagaries of transcription) during the appointment hearing. By contrast, a rule recognizing that a defendant who has been appointed an attorney has "obtained" an attorney for purposes of the Sixth Amendment would be easy to understand and administer for defendants, the courts, and the police.

Accordingly, the decision below should be overturned.

ARGUMENT

I. The Police May Not Initiate A Pre-Trial Interrogation Of A Defendant, Like Montejo, Who Has Counsel.

It is well established that once "a defendant obtains or even requests counsel," statements obtained from the defendant during subsequent police-initiated custodial questioning regarding the charge at issue (even if the defendant purports to waive his rights) are inadmissible. *Michigan v. Harvey*, 494 U.S. 344, 352 (1990) (citing *Patterson v. Illinois*, 487 U.S. 385, 390 n.3 (1988) (once the "accused has a lawyer" police may not initiate pre-trial questioning)). The rule described in *Harvey* and *Patterson* was established more than 20 years ago in *Michigan v. Jackson*, 475 U.S. 625 (1985). As the Court made clear in *Jackson*, such a rule is necessary to protect the defendant's "'right to rely on counsel as a medium between him and the State'" during custodial interrogations. *Id.* at 632 (quoting *Maine v. Moulton*, 474 U.S. 159, 176 (1985)). The conduct of the authorities who interrogated Montejo after he had a lawyer appointed to represent him was a direct violation of this Sixth Amendment rule.

Montejo was entitled to the protection of the Sixth Amendment when the police interrogated him after he was appointed counsel on September 10, 2002. Just last Term, the Court made clear that the Sixth Amendment right to counsel attaches "when the government has used the judicial machinery to signal a commitment to prosecute," and that a proceeding such as Louisiana's 72-hour hearing triggers attachment of the right. *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2591 (2008). It is equally clear the police's pretrial interrogation of Montejo was a "critical stage" of the criminal process at which Montejo was entitled to counsel's assistance. *Id.* ("[T]he accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings . . . ."); *id.* at 2594 (Alito, J., concurring) (noting that pretrial interrogation is one of the "critical stages" long recognized by the Court); *see also Moulton*, 474 U.S. at 170 (after the Sixth Amendment right to the assistance of counsel has attached, a defendant has the right to the assistance of counsel at every "critical stage" of the prosecution).

The record in this case makes clear that Montejo's Sixth Amendment rights were violated when the police initiated interrogation of him after he obtained appointed counsel at the 72-hour hearing. At the time Montejo was interrogated on September 10, 2002, his Sixth Amendment right to counsel had attached and he in fact obtained an attorney "by appointment" only hours earlier. *See Patterson*, 487 U.S. at 290 n.3; *see also* Pet. App. 51a (Louisiana Supreme Court ruling that Montejo "was told counsel was being appointed for him" at the 72-hour hearing). When the detectives returned to the jail to question Montejo shortly after the hearing, they were presumed to know that he was represented by appointed counsel.[5] *Jackson*, 475 U.S. at 634 ("Sixth

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[5] According to the Louisiana statute governing such proceedings, the very point of a 72-hour hearing is to provide counsel to indigent defendants. *See* note 6 n.2 *supra*.

Amendment principles require that we impute the State's knowledge from one state actor to another . . . . One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the state).""). The detectives initiated the subsequent questioning and the fruits of that questioning were introduced against Montejo at trial. Under settled law, "any statements obtained from the accused during subsequent police-initiated custodial questioning regarding the charge at issue (even if the accused purports to waive his rights) are inadmissible." *McNeil v. Wisconsin*, 501 U.S. 171, 179 (1991). Thus, the incriminating statements the detectives obtained during their interrogation on September 10, 2002 were obtained in violation of the Sixth Amendment and should not have been admitted into evidence.

II. The Louisiana Supreme Court's "Affirmative Acceptance" Requirement Should Be Rejected.

Despite finding that Montejo's right to counsel attached at his 72-hour hearing and that Montejo had been appointed counsel, Pet. App. 47a, the Louisiana Supreme Court nevertheless affirmed Montejo's conviction and capital sentence because it concluded that *Jackson* does not protect a defendant who actually has a lawyer absent "'an actual, positive statement or affirmation of the right to counsel.'" Pet. App. 47a-48a & n.68 (quoting *Montoya v. Collins*, 955 F.2d 279, 283 (5th Cir. 1992)). The Louisiana Supreme Court's decision should be reversed because it lacks any support in logic or in this Court's precedents, sets a trap for the unwary. and would create intractable problems of administration.

A. The Louisiana Supreme Court's Approach Lacks A Logical Foundation.

The Louisiana Supreme Court's decision rests on the implausible assumption that a defendant who remains silent while a court is appointing counsel does not "accept" that appointment. Far from indicating a desire to forego counsel's assistance, the accused's silence in the face of a routine procedure appointing counsel surely reflects the perfectly logical and reasonable judgment that nothing more is needed to secure counsel's assistance. After all, indigent defendants in Louisiana are not asked whether they want a lawyer — they are told they have a lawyer. So they have no occasion at the hearing to express their desire for counsel's assistance. Nor are defendants informed that they must make an affirmative gesture of acceptance in order to secure the protections of the Sixth Amendment. So they have no reason to think that they will lose any Sixth Amendment protection if they do not expressly affirm their desire to be represented by the lawyer who has been appointed for them.

Nothing in the record in this case supports a different inference in Montejo's case. There is no suggestion that Montejo was asked during the 72-hour hearing whether he "accepted" the lawyer that had been appointed to represent him. Nor does the record indicate that he was otherwise made aware that he needed to "accept" the appointment in order to secure his Sixth Amendment rights. And there is certainly nothing in the record indicating that he had "declined" the counsel being offered. In short, nothing at the hearing provides any basis to depart from the reasonable background understanding that silence constitutes acceptance of the counsel being offered. And any doubt on that score is dispelled by the evidence indicating that Montejo in fact understood that counsel had been appointed, and that he wanted the protections that counsel would provide when confronted by the St. Tammany Parish detectives on September 10, 2002. Pet. App. 49a; R. 2787 (Trial Tr. Mar. 8, 2005).

Further, the limitations on *Jackson* imposed by the Louisiana Supreme Court make no sense. If (as *Jackson* holds) an unfulfilled request for counsel triggers the constitutional protection against police-initiated interrogation, then actual appointment must necessarily do so as well. A defendant appointed counsel as part of a routine state judicial process simply has no need to ask for counsel (the act that triggered Sixth Amendment protection in *Michigan v. Jackson*) — as counsel has just been given to him — so nothing can plausibly turn on the defendant's failure to make such a request during the appointment hearing. In fact, the Louisiana Supreme Court's approach would lead to the anomalous result that defendants appointed counsel in States whose statutes provide that the defendant shall be asked whether he wants to be represented, *see*, *e.g.*, Cal. Penal Code § 859; Mich. Comp. Laws § 6.005(A), would receive the protections of the *Jackson* rule, while defendants in States such as

Louisiana that automatically appoint counsel without first asking the defendant would be left to vicissitudes of chance. Moreover, the reasons that justify the *Jackson* rule apply with equal force when a defendant actually has counsel. The risk of interference with the attorney-client relationship and the accused's ability to consult with counsel is equally strong whether a defendant has asked for a lawyer or has a lawyer — as the facts of this case vividly confirm. The opposite conclusion would lead to the perverse result that defendants who seek but do not obtain appointed counsel receive greater Sixth Amendment protection than do defendants who actually have counsel appointed for them.

In short, there is no basis to conclude that an accused's silence after appointment of counsel should be taken as a decision *not* to accept the appointment and to deal with the prosecution unaided. Although a defendant is free to "mak[e] an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone," *Patterson*, 487 U.S. at 291, the "initial election" must be made "knowingly and intelligently," *id.* A defendant's silence — especially where, as here, there is no indication that the defendant was warned about the possible consequences of his failure to make an affirmative statement accepting the appointment — cannot support the conclusion that the defendant has chosen to "go it alone" rather than rely on counsel as an intermediary in dealing with the prosecution.

B. The Holding Below Is Erroneous Under Governing Precedent.

Unsurprisingly, the Louisiana Supreme Court's approach cannot be reconciled with this Court's precedents. This Court's decisions have consistently presupposed that the appointment of counsel is sufficient to invoke the Sixth Amendment bar against police-initiated interrogation.

This Court's decision in *Patterson v. Illinois* makes the point clearly. *Patterson* involved a defendant who had neither requested a lawyer nor had one appointed for him. The Court held that the police could interrogate a defendant under those circumstances provided that the defendant waived his right to an attorney under *Miranda.* This Court took pains to observe, however, that it was "a matter of some significance" that Patterson was not "an accused [who] *has* a lawyer." 487 U.S. at 290 n.3 (emphasis added). For once an accused has a lawyer, "a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." *Id. Patterson* specifically cited *Jackson*'s prohibition on police-initiated interrogations as one of the protections that arises when a defendant "has" a lawyer. *Id.* The case therefore unambiguously indicates that *Jackson* protects all defendants who have a lawyer.[6]

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[6] In Sixth Amendment decisions preceding *Michigan v. Jackson*, the Court recognized that, once a defendant has counsel, the police may not interrogate a defendant in the absence of his counsel. *See, e.g., Massiah v. United States*, 377 U.S. 201, 201 (1964) (holding that the State's surreptitious interrogation of

Likewise, in *Michigan v. Harvey*, 494 U.S. 344, 352 (1990), the Court found that the protections of *Jackson* were triggered by the appointment of counsel at Harvey's initial arraignment, and did not attribute any additional significance to a request for counsel. As the Court phrased it, "once a defendant *obtains* or even requests counsel . . . analysis of the waiver issue changes" and *Jackson* applies. *Id.* at 352 (emphasis added). *Id.* at 346. The significant fact in *Harvey* was that the defendant had a lawyer. The Court made the point that a defendant who "even requests counsel" should receive the same protection as a defendant who has counsel — not that defendants who request lawyers receive more

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the defendant violated the Sixth Amendment, based on the mere fact that "[h]e retained a lawyer"); *Moulton*, 474 U.S. 159, 162, 176-80 (holding that the State's tape recording of defendant's telephone conversations with police agent violated the Sixth Amendment, where defendant had previously appeared in court to enter a plea of not guilty "represented by retained counsel"); *Brewer v. Williams*, 430 U.S. 387, 400-02 (1977) (invoking "the clear rule of *Massiah* . . . that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him" in holding that the direct interrogation of the defendant in the absence of his retained counsel violated the Sixth Amendment). In *Jackson*, the Court cited *Massiah* and *Brewer* for the proposition that "a valid waiver of counsel rights should not be inferred from the mere response by the accused to overt or more subtle forms of interrogation or other efforts to elicit incriminating information." 475 U.S. at 635 n.9 (internal citations and quotation marks omitted). The Court explained, "In *Massiah* and *Brewer*, counsel had been engaged or *appointed* and the admissions in question were elicited in his absence." *Id.* (emphasis added).

Sixth Amendment protection than defendants who have been appointed lawyers.

The same situation arose in *United States v. Henry*, 447 U.S. 264, 269-75 (1980), where the Court held that the police's attempt to obtain statements surreptitiously from the defendant in the absence of his appointed counsel constituted "impermissible interference with the right to the assistance of counsel." Again, the Court imposed no requirement that the defendant affirmatively express a desire to rely on counsel. That Henry had been appointed counsel sufficed. *See id.* at 276 (Powell, J., concurring) ("'The rule of *Massiah* serves the salutary purpose of preventing police interference with the relationship between a suspect and his counsel once formal proceedings have been initiated.").

In each of these cases, the dispositive facts were that (i) the defendant's Sixth Amendment right had attached and (ii) the accused in fact had a lawyer. None turned on whether the accused requested the assistance of counsel or expressed a preference to be interrogated only in the presence of counsel. If a defendant "has a lawyer," *Patterson*, 487 U.S. at 290 n.3, the *Jackson* rule applies, just as it does when a defendant asks for but does not receive a lawyer. The point of *Jackson*, after all, was not to provide superior protection for defendants who merely ask for lawyers. It was to ensure that defendants who ask for but have not yet obtained the assistance of counsel are not afforded inferior protection to defendants who actually have lawyers. *See Jackson*, 475 U.S. at 627 (noting that counsel had been appointed for the defendant in response to his request, at arraignment, but that the police-initiated interrogation producing incriminating evidence occurred before appointed counsel had an opportunity to speak with the defendant).

The Louisiana Supreme Court's approach is also irreconcilable with *Moran v. Burbine*, 475 U.S. 412, 428 (1986). In that case, a criminal suspect whose Sixth Amendment rights had not yet attached was interrogated while being kept ignorant of the fact that a lawyer his family had obtained to represent him was trying to reach him to provide assistance during the interrogation. The Court held that such conduct was permissible because the suspect had not been arrested and his Sixth Amendment right to counsel had not attached. But the Court could not have been clearer that such interrogation is impermissible once the Sixth Amendment right attaches, even with a *Miranda* waiver. For "once the right *has* attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a 'medium' between [the suspect] and the State during interrogation." *Id.* at 428 (internal quotation marks omitted); *see also Patterson*, 487 U.S. at 296 n.9 (reciting this statement in *Moran* with approval). If a family member's decision to obtain counsel is sufficient to give rise to Sixth Amendment protections, then surely the State's decision to appoint counsel must be sufficient.

The conclusion that a defendant's silence effectively rejects rather than accepts appointment of counsel is also impossible to square with this Court's jurisprudence concerning when a criminal defendant may be deemed to have validly waived the right to assistance of counsel. "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer." *Carnley v. Cochran*, 369 U.S. 506, 516 (1962). As *Carnley* establishes, without such a showing, there is no basis for concluding that a violation of a defendant's Sixth Amendment right to counsel can be excused by waiver. Yet that is precisely what the Louisiana Supreme Court's approach purports to do. For similar reasons, a defendant is permitted to proceed to trial pro se only after he has "be[en] made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta v. California*, 422 U.S. 806, 835 (1975) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). In sharp contrast, the starting point for the Louisiana Supreme Court's approach is nothing less than a presumption from "silence" that the defendant has opted to act without counsel.

In light of this Court's precedents, a strong majority of the state high courts to have addressed the question have concluded that appointment triggers the Sixth Amendment *Jackson* rule. *See, e.g.*, *State v. Dagnall*, 612 N.W.2d 680, 695 (Wis. 2000) (holding that "[t]o require an accused person to assert the right to counsel after the accused has counsel would invite the government to embark on a persistent campaign of overtures and blandishments to induce the accused into giving up his rights");

Bradford v. State, 927 S.W.2d 329, 335 (Ark. 1996) (explicitly overturning an earlier Arkansas Court of Appeals case that required affirmative invocation); *Holloway v. State*, 780 S.W.2d 787, 795 n.10 (Tex. Ct. Crim. App. 1989) (holding that "police initiated interrogation of an indicted accused who . . . has been appointed defense counsel" is impermissible, and that "the Sixth Amendment will impose higher waiver standards in those situations in which higher standards appear necessary to preserve the integrity of preexisting attorney-client relationships."); *Dew v. United States*, 558 A.2d 1112, 1116 (D.C. 1989) (finding "little, if any, room for an argument that the Supreme Court would permit a police-initiated request for a post-indictment waiver of counsel by a represented defendant, except through defense counsel"); *People v. Kidd*, 544 N.E.2d 704, 713 (Ill. 1989) (relying on the statement in *Patterson* that "a distinct set of constitutional safeguards" takes effect "[o]nce an accused has a lawyer" in holding that the police "knowingly circumvented defendant's right to counsel" by obtaining incriminating statements in the absence of his appointed counsel").

The Louisiana Supreme Court, however, followed the reasoning of the Fifth Circuit in *Montoya v. Collins* in holding that Montejo's silence meant that he did not "accept" his appointment of counsel. *See* Pet. App. 47a-48a; *Montoya*, 955 F.2d at 283. The *Montoya* court read the phrase "accepted by appointment" in this Court's *Patterson* decision to create a rule under which an appointment of counsel is ineffective unless the defendant affirmatively indicates acceptance. *See Patterson*, 487 U.S. at 290 n.3. But that reading is wrong. If anything, the Court's choice of words suggests the opposite. *Patterson* did not state that Sixth Amendment protection is triggered when a defendant "chooses to accept" appointed counsel, or even that the protection is triggered when the defendant "accepts an appointment" of counsel. Rather, the opinion uses the phrase "accepted by appointment," indicating that appointment itself connotes acceptance. *Id.* That is doubtless why in *Patterson*, and in later cases, the Court has consistently said that the *Jackson* rule is triggered when a defendant "retain[s]" or "obtains" counsel — rather than when a defendant asks for counsel. *Id.*; *Harvey*, 494 U.S. at 352.[7]

In short, this Court's cases simply leave no room for the Louisiana Supreme Court's approach to limiting *Jackson*. To be sure, three members of the Court have questioned the breadth of *Jackson* on the ground that it may in some circumstances "override" the "free choice of a suspect [whether] to remain silent" when interrogated in the absence of appointed counsel. *See Texas v. Cobb*, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring). Whether a narrowing of *Jackson* is appropriate in light of these concerns would presumably depend upon whether the Court concludes that any cost to "free choice" that results from the current rule outweighs the values of adhering to *stare decisis* and maintaining a clear-edged, bright-line precept for the regulation of police conduct. *Cf. Dickerson v. United States*, 530 U.S. 428, 444 (2000). However, any such reconsideration must be left for another day because this case is the polar opposite of a "free choice" situation. *This* case is one in which the police acted "in a calculated way to undermine" the accused's constitutional protections. *Cf. Missouri v. Siebert*, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring in judgment).

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[7] In *Montoya*, the Fifth Circuit dismissed *Harvey*'s reference to "obtaining" an attorney as being inapplicable to a defendant who is appointed an attorney but remains silent during the hearing. *Montoya*, 955 F.2d at 284. According to the Fifth Circuit, that language "is reasonably construed to refer to situations where a defendant 'obtains' counsel after, and because, he 'requests' counsel." *Id.* But there is no basis, in the *Harvey* decision or elsewhere, for limiting the meaning of "obtains" to refer only to situations where counsel is obtained because of a request by the defendant. *Harvey* used the terms "obtains" and "even requests" in the disjunctive as two alternative triggers for Sixth Amendment safeguards.

Montejo repeatedly made clear to his interrogators that he did not choose to deal with them in the absence of a lawyer, but the police used a succession of tactics to persuade him to reverse that choice. When he first told them he did not wish to speak with them without a lawyer, they responded that they would not recommend his insisting on obtaining counsel. When he later told them again during an intense interrogation that "I would like to answer no more questions unless I'm in front of a lawyer," they undertook to teach him the danger of such persistence by penalizing his renewed request with an immediate charge of first-degree murder. Then after a lawyer had been appointed to represent him, they undertook to persuade him of the futility of requesting the lawyer's assistance in dealing with them, by falsely informing him that no such appointment had been made. And they then quickly removed him from the police station for further interrogation (which resulted in the incriminating evidence at issue here) before his appointed counsel had any opportunity to meet with him, thus depriving him of any opportunity to consult with counsel to discuss the advisability of further discussion with the police. *Cf. Cobb*, 532 U.S. at 172 n.2. Whatever the merits of the criticism of *Jackson* in other circumstances, there is manifestly no reason for refusing to follow it here.

C. The Louisiana Supreme Court's Rule Is Unfair And Not Administrable.

Even if the Louisiana Supreme Court's approach were not foreclosed by this Court's precedents (and it is), reversal is still warranted because Louisiana's rule is unfair and would create unacceptable problems of administration.

First, the Louisiana Supreme Court's approach creates a trap for the unwary. In situations such as the one presented in this case, an accused who desires to exercise his right to counsel would be expected to remain silent, reasonably believing that the appointment itself obviates any need to take additional steps to secure the protections that the appointment of counsel are meant to provide. The defendant is neither asked whether he or she wants a lawyer nor told that the full scope of Sixth Amendment protection will not arise absent an affirmative statement accepting the appointment. Under the Louisiana Supreme Court's approach, defendants who rely on the appointment of counsel by the court as an affirmation of their right to counsel thus do so, unknowingly, at their peril. They have no reason to think that their silence will forfeit an important constitutional protection. And they have every reason to remain silent, given that they have just been appointed a representative whose responsibility it is to speak for them in the criminal process.

Second, the Louisiana Supreme Court's approach would generate intractable problems of administration. Under that approach, determining whether a defendant's Sixth Amendment right to counsel was invoked would require a context-sensitive "totality of the circumstances" analysis in every case. Courts would have first to determine the historical fact of what defendants actually said respecting their desire to accept an appointment of counsel and then decide whether whatever was said amounted to acceptance or affirmation of the appointment. Making such factual determinations will be particularly vexing because most jurisdictions do not transcribe the initial hearings at which counsel is appointed. Disputes will therefore have to be resolved on the basis of after-the-fact swearing contests. This evidentiary void is not a design flaw; rather, it reflects the natural conclusion that the defendant has accepted the counsel appointed, thus obviating the need to record or further elicit the defendant's choice.[8]

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[8] Indeed, Louisiana's procedures for recording minute entries of the appointment of counsel in capital cases illustrate precisely this problem. The Louisiana Code of Criminal Procedure requires that the court minutes "show either that the defendant

The protection of a defendant's Sixth Amendment right to counsel should not turn on the kinds of highly subjective and idiosyncratic determinations the Louisiana Supreme Court's approach would require. *See, e.g., Rothgery*, 128 S. Ct. at 2588 (rejecting a rule tying attachment of the right to counsel to prosecutorial awareness, because such a rule would be "wholly unworkable," "impossible to administer," and "have the practical effect of resting attachment on such absurd distinctions as the day of the month an arrest is made"). Thus, the Court should refuse here to undermine the clarity and simplicity of *Jackson*'s bright line approach, just as it refused in *Moran v. Burbine* to modify the *Miranda* rule to require the police to provide additional warnings when a custodial suspect's lawyer is trying to reach him. In *Moran*, the Court held that such additional requirements would "clearly undermine" *Miranda*'s "central virtue of informing police and prosecutors with specificity . . . what they may do in conducting [a] custodial interrogation, and of

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was represented by counsel or that he was informed by the court of the defendant's right to counsel, including the right to court-appointed counsel, and that he waived such right." La. Code Crim. Proc. Ann. art. 514. The Louisiana Code's requirement that the record contain minute entries of either appointment of counsel or informed waiver of counsel assumes that criminal defendants are in only one of two possible positions: Either the defendants have been appointed counsel, or they have waived counsel. The provision does not account for the need to record a third category of defendant who has been appointed counsel but has not ratified that appointment. Thus, the minute requirements do not create the kind of record necessary to implement the Louisiana Supreme Court's approach to affirmative acceptance of counsel.

informing courts under what circumstances statements obtained during such interrogations are not admissible." *Id.* at 426 (internal quotation marks omitted; alternations in original); *see also Berkemer v. McCarty*, 468 U.S. 420, 430 (1984) (refusing to adopt a proposed exception to the *Miranda* rule because doing so would "substantially undermine" the *Miranda*'s "crucial advantage" of clarity); *Dickerson*, 530 U.S. at 444 (declining to overrule *Miranda*, in part because the alternative of case-by-case assessments of voluntariness would be "more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner."). The same reasoning applies here.[9]

Thus, the Louisiana Supreme Court's approach is insupportable and should be rejected.

D. Even If An Affirmative Acceptance Were Required, Montejo Affirmatively Accepted Counsel.

Even if an accused were required to make some kind of an affirmative statement to secure the protections of the Sixth Amendment against police-initiated interrogation, Montejo made such a statement. When the detectives approached him on September 10, 2002, after he had been appointed counsel at his 2-hour hearing, Montejo told them that he had a lawyer and did not want to speak without his lawyer present. Pet. App. 49a; JA 242 (Testimony of Montejo) ("I don't really want to go with you . . . I got a lawyer appointed to me. . . . I think I got a lawyer appointed to me.").[10] If Montejo had somehow not "accepted" his appointed counsel prior to the officers' approach, his unambiguous expression of a desire not to accompany the police absent his appointed counsel surely was sufficient acceptance. Thus, even under the Louisiana Supreme Court's erroneous approach, there was no basis for upholding the police-initiated interrogation after Montejo had counsel.

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[9] A rule requiring an affirmative act of acceptance would also create uncertainty for police officers, who will have to determine whether a particular defendant affirmatively accepted counsel before they can begin interrogation.

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[10] The Louisiana Supreme Court noted that Montejo and one of the officers who conducted the interrogation on September 10th offered differing accounts of what was said about Montejo's appointed counsel, but the court made no factual findings as to which version was correct. *See* Pet. App. 21a nn.46 & 47; *id.* at 49a-50a. In any event, Detective Hall's testimony was in some respects consistent with Montejo's. For example, Detective Hall stated that Montejo "told him he had not been contacted by an attorney," *id.* at 50a, when the officers began to interrogate him — which apparently is true, as Montejo's court-appointed lawyer was trying *unsuccessfully* to reach Montejo while the police were interrogating him. *See id.* 21a n.46 ("Detective Hall was confronted by indigent defense counsel when he returned Montejo to jail); *see also* JA 180-81 (testimony of Detective Hall) (explaining that Montejo's attorney "was pretty upset that I had been out with Montejo that afternoon, and he started getting on me pretty intently about having been retained as his counsel"). According to the Louisiana Supreme Court, Detective Hall also "testified that, at some point during this excursion," — *i.e.*, *after* the police had improperly obtained the "waiver" — "he asked Montejo whether he had a lawyer or anyone in his family had contacted him about retaining one for him, and Montejo responded negatively." Pet. App. 21a n.46.

Because the police-initiated interrogation after Montejo had been appointed counsel violated the Sixth Amendment, the "confession" letter should never have been admitted at trial, and Montejo's conviction must be overturned.

III. This Court Should Reject The State's Harmless Error Argument.

In its brief in opposition to the petition for certiorari, the State suggested that the judgment of the Louisiana Supreme Court should be affirmed because the violation of Montejo's Sixth Amendment rights was harmless error. Br. in Opp'n to Pet. for Writ of Cert. at 21-22. That suggestion should be rejected.

Because the Louisiana Supreme Court did not undertake a harmless error analysis, this Court would generally remand rather than consider the harmless error question in the first instance. *See, e.g.*, *Sandstrom v. Montana*, 442 U.S. 510, 526 (1979); *Carella v. California*, 491 U.S. 263, 266 (1989); *Neder v. United States*, 527 U.S. 1, 25 (1999); *Dobbs v. Zant*, 506 U.S. 357, 359 n.* (1993) (per curiam).

Here, however, the error plainly was not harmless. Because the issue is presented on direct review, the *Chapman* standard applies. *See Chapman v. California*, 386 U.S. 18 (1967). Under *Chapman*, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless, beyond a reasonable doubt." *Id.* at 24; *see also Fry v. Pliler*, 127 S. Ct. 2321, 2325 (2007); *Neder*, 527 U.S. at 15-16; *Sullivan* *v. Louisiana*, 508 U.S. 275, 278-79 (1993). It is the State's burden to prove that the error was harmless. *See Sullivan*, 508 U.S. at 279; *Chapman*, 386 U.S. at 24.

The State cannot meet that stringent burden. Montejo's letter amounts to a confession that he committed the crime; it is difficult to imagine evidence more highly probative of guilt. *See Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (alterations in original) ("[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.").

In this instance, moreover, the confession was particularly powerful because of the absence of physical evidence to show that Montejo had committed the murder. As noted, *see supra* 10-11, neither the murder weapon nor the victim's money bag was ever found, and no blood was found in Montejo's car or on his clothing. Moreover, the police had refused to investigate seriously Montejo's contention that another individual had shot the victim.

It is therefore unsurprising that the prosecution relied heavily upon this letter throughout the trial, raising it during its opening statement, the testimony of a key witness, and its closing statement. The prosecution's opening statement repeatedly and dismissively invoked what it referred to as Montejo's "I'm so sorry" defense. *See* JA 166 ("The defendant .

. . write[s] a letter to this lady and tell[s] her I'm sorry, I am so sorry. . . . [I]t shouldn't have happened this way and he feels sorry."); R. 2258-59 (Trial Tr. Mar. 5, 2005) (Wait, wait, wait, we got another version . . . the I am so sorry version."); R. 2259 (Trial Tr. Mar. 5, 2005) ("So it will be up to you to evaluate the . . . I-am-so-sorry version. . . ."); R. 2261 (Trial Tr. Mar. 5, 2005) ("We also then get the I'm-so-sorry version"). By the end of the prosecution's opening statement, the prosecution was using the letter not just to incriminate Montejo but to mock him. R. 2262 (Trial Tr. Mar. 5, 2005) ("It was a close contact wound. I am so sorry.").

The prosecution next used the letter to impeach the testimony of Mary Melancon, the only witness called by Montejo to testify on his behalf. After being shown the letter, Melancon testified that she "didn't even know that [the letter] existed" JA 252. The prosecution then showed the letter to the jury. R. 2819-20 (Trial Tr. Mar. 8, 2005).

Finally, during the rebuttal portion of closing argument — the last statement the jury heard before it began deliberating — the prosecution again returned to "I am so sorry" and invited the jury to credit Montejo's confession while at the same time calling him a liar. *See* JA 290-91 ("[Y]ou know [it] is not to be true" that "the finest of St. Tammany Parish police officers lied, deceived you, because they coerced an apology letter from the defendant."); R. 2834 (Trial Tr. Mar. 9, 2005) ("A man died for that shit, you are touching my heart. . . . Another lie. I am so sorry.").

In sum, as a result of the erroneous admission of the letter, the prosecution was able to raise highly damning evidence at all stages of the trial. Such an error could not possibly have been harmless beyond a reasonable doubt. *See Sullivan*, 508 U.S. at 279.

CONCLUSION

The judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

DONALD B. VERRILLI, JR.
Counsel of Record
IAN HEATH GERSHENGORN
KATHERINE A. FALLOW
MATTHEW S. HELLMAN
THOMAS H. KIM
ADAM G. UNIKOWSKY*
CAROLINE D. LOPEZ*
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001
(202) 639-6000

JELPI P. PICOU
G. BEN COHEN
ROBERT J. SMITH
THE CAPITAL APPEALS
PROJECT
636 BARONNE STREET
NEW ORLEANS, LA 70113
(504) 529-5955

November 17, 2008

* Not admitted in DC; supervised by principals of the firm

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
DEC 17 2008
OFFICE OF THE CLERK

9

No. 07-1529

In the Supreme Court of the United States

JESSE JAY MONTEJO
Petitioner
v.

STATE OF LOUISIANA
Respondent

ON WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF FOR RESPONDENT

KATHRYN LANDRY
Counsel of Record
WALTER P. REED
HOUSTON C. GASCON, III
SCOTT C. GARDNER
Post Office Box 82659
Baton Rouge, LA 70884
Telephone: (225) 766-0023

Counsel for Respondent, State of Louisiana

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QUESTION PRESENTED

Does the rule established by the Court in *Michigan v. Jackson*, 475 U.S. 625 (1986) bar police interrogation when a defendant has not requested counsel or otherwise asserted his right to counsel and has validly waived his right to counsel, but a court has appointed the Indigent Defender Board to represent him?

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La.C.Cr.P. Art. 230.1 4

STATEMENT OF THE CASE

A. *Facts of the Crime*

On September 5, 2002, Lou Ferrari was murdered in his home in St. Tammany Parish, Louisiana. He was found in the kitchen by his wife, Pat Ferrari. Lou Ferrari had suffered two gunshot wounds, one to the right chest area and one to the right eye. (Testimony of Dr. Michael Difatta, State Court Record at p. 2268 and 2272). The wound to the chest was determined to be a contact wound, meaning the gun was in contact with Mr. Ferrari's body when it was fired. However, the gunshot wound to the chest exited Mr. Ferrari's body and was a non-fatal injury. (Testimony of Dr. Michael Difatta, State Court Record at pp. 2269–2270). The gunshot wound to the right eye resulted in complete destruction of the right eye. The bullet traveled through the eye, then through the right base of the brain, and exited the back of Mr. Ferrari's skull. This gunshot wound was fatal within a matter of seconds. (Testimony of Dr. Michael Difatta, State Court Record at pp. 2272-2273).

The Ferrari family owned and operated a dry-cleaning business for approximately 26 years, with ten stores in the area at the time of Mr. Ferrari's murder. Lou Ferrari's wife, Pat, and son, Louis, worked with him in the business. Petitioner, Jesse Montejo, was an acquaintance/friend of Jerry Moore[1]. Moore had performed mechanical work on equipment at the Ferrari dry cleaning facilities for a number of years. Montejo befriended Moore, and prior to and at the time of the murder, Moore paid Montejo to drive him to work.

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[1] As a result of his role in the murder of Lou Ferrari, Jerry Moore was charged with and convicted by a jury of second degree murder under Louisiana law. Jerry Moore was not present at the

Montejo drove a blue van, which was his mode of transportation in driving Moore. (Testimony of Louis Ferrari, III, State Court Record at pp. 2428). The blue van was apparently quite distinctive, with a "cattle guard" on the front. (Testimony of Stacy Stubbenville, State Court Record at pp. 2438-2439). Neighbors of the Ferraris saw Montejo's blue van in the neighborhood the day before the murder and again at the approximate time of the murder. In fact, the blue van left the scene at a high rate of speed, along with Mr. Ferrari's white Lincoln vehicle, stolen during the course of the robbery.[2] (Testimony of Lawrence Landry, State Court Record at pp. 2453, Joanne Discaro, at pp. 2445, Janice Dow, at pp. 2467).

---

time of the murder and did not discharge the weapon. He later identified Montejo as the shooter. Moore was sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. The conviction and sentence of Moore was affirmed by the Louisiana First Circuit Court of Appeal, Docket no. 2006 KA 1979, and the Louisiana Supreme Court denied his writ application.

[2] A third person, Eric Gai, was identified as the other driver leaving the scene. Mr. Gai pled guilty to manslaughter in connection with his role in this murder.

B. Pretrial Interrogations of Montejo

As a result of the information gathered by the police regarding the increasingly hostile relationship between Mr. Ferrari and Jerry Moore, Montejo's relationship with Moore, and the eyewitnesses who placed Montejo at the scene of the murder at the approximate time, Montejo was picked up for questioning.

The police obtained, pursuant to a valid waiver, a videotaped confession from Montejo, which is not at issue herein and was obtained prior to the attachment of his Sixth Amendment right to counsel. As part of his confession, Montejo's repeated rationalization to the police in order to downplay his intent to cause harm to Mr. Ferrari was the claim that the gun used to kill Mr. Ferrari was not brought to the scene by Montejo, but instead found during the burglary by him. It was clear that Montejo, during the videotaped statements, wanted to assist the police in locating the gun, because he believed it would corroborate his lack of intent. During the videotaped statements, Montejo gave several increasingly incriminating statements, but he admitted to shooting Mr. Ferrari in what he described as a botched burglary. He said that Jerry Moore persuaded him to burglarize Mr. Ferrari's home, which he believed would be unoccupied, unlocked and full of money, and he agreed to do it because his rent was due. However, he said he found the victim's gun inside the home and when Mr. Ferrari returned home and surprised him, Montejo hit him in the head with the gun, warned him to stay back, fired a warning shot, and when that failed, shot and killed Mr. Ferrari, before firing the weapon into the couch to un-cock it and throwing the gun in the lake. (Louisiana Supreme Court opinion, Pet. App. 16a-17a).

On the morning of September 10, 2002, a 72 hour hearing, pursuant to article 230.1 of the Louisiana Code of Criminal Procedure was held. Article 230.1 provides that the sheriff or law enforcement officer having custody of an arrested person shall bring him promptly, and in any case within seventy-two hours from the time of the arrest, before a judge for the purpose of appointment of counsel, and the judge may also determine or review a prior determination of the amount of bail. The minute entry from that 72 hour hearing is included in Petitioner's Appendix D, p. 63a. It shows that the petitioner was present, that no bond was set because the petitioner was being charged with first degree murder, and that the "court ordered the Office of Indigent Defender be appointed to represent the petitioner". No individual attorney was appointed.

Later that morning, the police detectives approached Montejo to ask if he would assist in the search for the gun by accompanying them to the area where he had already told them he threw the gun into the lake. According to the detectives, they asked Montejo if he had obtained counsel, and he told them he had not. Montejo did not testify at the suppression hearing. At trial, he testified for the first time that he told the detectives he thought he had a lawyer appointed.

Although petitioner alleges, citing his own testimony at trial, that he told Detective Hall he had a lawyer appointed to him that morning, petitioner's testimony directly contradicts the testimony of the officers. Detective Jerry Hall testified that he asked Montejo that morning if he had been contacted by an attorney, to which Montejo responded that he had not. (Testimony of Detective Jerry Hall, Joint Appendix, p. 79). Montejo not only did not tell the officers that counsel had been appointed, but he unequivocally denied having a lawyer when directly asked by Detective Hall. In fact, Montejo told the detectives he just wanted to clear this up and never requested a lawyer. (Testimony of Detective Jerry Hall, Joint Appendix, p. 82).

Montejo was again provided with his *Miranda* rights and again waived such rights before accompanying the detectives to the lake. While in the back of the police vehicle on the way back to the jail, Montejo requested a pad and pen from the detectives and told them he wanted to write something. (Testimony of Det. Jerry Hall, Joint Appendix p. 179). He wrote a letter to the widow of the victim, expressing remorse for the shooting of her husband. This letter was consistent with the videotaped statement in which he claimed that he found the gun while in the home and tried to use it to scare Mr. Ferrari. The substance of the letter is reproduced in footnote 49 of the opinion of the Louisiana Supreme Court, found at pp. 22a-23a of Petitioner's Appendix A.

C. The Trial and Conviction

The overwhelming evidence at trial proved to the jury Montejo's guilt.

In addition to the evidence placing Montejo at the scene of the murder, the investigating officers and crime scene personnel collected fingernail scrapings from Lou Ferrari. Photographs were taken of petitioner, which showed abrasions on his neck. (Testimony of Detective Jerry Hall, State Court Record at pp. 2712-2713). Dr. Sudhir Sinha, an expert in molecular biology and DNA, performed the DNA testing on these scrapings. Dr. Sinha testified that the DNA in the left fingernail scrapings resulted from an intentional scratch and was not the result of minor contact, such as shaking hands. According to Dr. Sinha, there was a high degree of certainty, the chance of a random match being 1 in 163 billion, that the DNA found in the fingernail scrapings from the victim matched petitioner. (Testimony of Dr. Sudhir Sinha, State Court Record at pp. 2623-2632). There was simply no theory of innocence consistent with this powerful forensic finding of an intentional scratch. The only evidence put forth by defendant to explain this DNA evidence was his own self serving testimony.

Once Mr. Ferrari entered his home that afternoon, he had no means of escaping Montejo, intent on getting the money he wanted. The testimony of the Chief Deputy Coroner, Dr. Michael Difatta, established that the gunshot wound to Mr. Ferrari's eye would have resulted in almost instantaneous death, dropping the victim "right there". (Testimony of Dr. Michael Difatta, State Court Record at p. 2273). The crime scene photographs showed the position of Mr. Ferrari, demonstrating that the victim was cornered in the kitchen by Montejo when he was shot and killed.

Petitioner testified at the trial and admitted he was at the Ferrari house when Lou Ferrari was murdered, although he claimed that he was there by virtue of an invitation from Mr. Ferrari (another claim for which there is no evidence). Petitioner claimed at trial that a black male who he could only identify as D.P. was the murderer. However, Montejo had previously confessed in a videotaped interview with police. As the Louisiana Supreme Court noted in its decision, the story he gave at trial was the seventh version of the crime given by Montejo, which was "an elaborated variation" of the fifth version. (Pet. App.18a). Montejo, as detailed below, had an extensive criminal history. During the interrogation, Montejo is clearly a savvy ex-con, who was trying to read the police, attempting to determine how much they knew as he spoke with them. He gave the police bits and pieces of information, which gradually increased until he confessed to shooting Mr. Ferrari. Even then, he tried to minimize his role and intent in the crime. As the Louisiana Supreme Court noted, the jury watched approximately four hours of the videotaped police interrogation of Montejo, "during which Montejo slowly made increasingly incriminating statements until he finally admitted that he shot the victim, who had unexpectedly returned home and interrupted Montejo's burglary." (Pet. App. 9a). Montejo further testified at trial to his extensive criminal history from Florida, with numerous convictions for crimes such as theft, burglary and armed burglary.

The jury found Montejo guilty of first degree murder on March 9, 2005. Following the penalty phase, which was held on March 10, 2005, the jury determined that Montejo should be sentenced to death. Montejo's conviction and sentence were affirmed by the Louisiana Supreme Court on January 16, 2008, and his request for rehearing was denied on March 7, 2008.

D. The Lower Court Opinions

With respect to the suppression hearing on this issue, the district court relied upon *Moran v. Burbine*, 475 U.S. 412 (1986). The court held that the fact an attorney was appointed did not prevent Montejo from exercising or waiving his rights. Since he had waived his right to counsel, the court denied the motion to suppress the letter at issue. (Joint Appendix 160-162).

Montejo appealed to the Louisiana Supreme Court, alleging numerous assignments of error. With regard to the admission into evidence of the apology letter at issue, the Louisiana Supreme Court relied upon a decision issued by the Fifth Circuit in *Montoya v. Collins*, 955 F.2d 279 (5th Cir. 1992), *cert. denied* 506 U.S. 1036 (1992). Following the reasoning of the United States Court of Appeals for the Fifth Circuit, the Louisiana Supreme Court held that something more than "mute acquiescence" in the appointment of counsel is necessary to trigger the enhanced protection provided by *Michigan v. Jackson, supra.* (Pet. App. 47a). Since defendant did not make a request for counsel, *Michigan v. Jackson* was not applicable, and the introduction of the apology letter into evidence was upheld.

SUMMARY OF ARGUMENT

The apology letter written by Montejo was properly admitted into evidence, because he made a voluntary, knowing and intelligent waiver of his right to counsel before writing the letter.

Montejo did not assert or otherwise invoke his right to counsel, and accordingly, did not trigger the protections of *Michigan v. Jackson.* The attachment of the Sixth Amendment right to counsel should be distinct from the assertion of such right. *Michigan v. Jackson* was premised upon the *request* for counsel by that defendant. In the subsequent decision in *Patterson v. Illinois*, the Court also focused on the lack of a *request* for counsel, noting that defendant had not retained, or accepted by appointment, a lawyer to represent him.

A petitioner should be required to make a clear and unambiguous assertion of his right to counsel, consistent with the requirement in *Edwards v. Arizona*, prior to implementing the harsh consequences of *Michigan v. Jackson*, thereafter barring any police initiated contact with the petitioner. Just as a petitioner is entitled to be informed of his rights, the police are entitled to be adequately informed when a suspect desires to assert his right to counsel.

ARGUMENT

A. An "Assertion" or "Request" for Counsel Is Necessary to Invoke The Constraints of Michigan v. Jackson

1. The voluntary choice of a petitioner to speak with police should not be automatically invalidated without a sufficiently clear assertion of the right to counsel

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence". U.S. Const. amend. VI. The purpose of the Sixth Amendment is to "assure that in any 'criminal prosecution' the accused shall not be left to his own devices in facing the 'prosecutorial forces of organized society'". *Moran v. Burbine*, 475 U.S. at 430.

In *Michigan v. Jackson*, 475 U.S. 625, 636 (1986), this Court held that if police initiate interrogation after a defendant's *assertion*, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid. (Emphasis added.).

Petitioner asserts that the mere appointment of counsel at the 72 hour hearing on September 10 triggered the rule of *Michigan v. Jackson*, and as a result, the apology letter written by Montejo is per se invalid. The effect of petitioner's argument herein would be to invalidate an otherwise voluntary choice to speak with police based upon his claim that the "well established" rule prohibits subsequent police-initiated custodial questioning once a petitioner "obtains" counsel "even if the petitioner purports to waive his rights". (Pet'r Br. at p. 18). In other words, petitioner's argument does not take into consideration whether or not a petitioner requests counsel, but merely abrogates any choice of a suspect when counsel has been appointed and further signifies that any purported waiver is invalid. The voluntariness of Montejo's waiver given on September 10 is not at issue, but he claims that no waiver could be given. Petitioner's argument is essentially that once a petitioner's Sixth Amendment right to counsel has attached, the rule of *Michigan v. Jackson* applies, even though petitioner has not requested counsel or affirmatively invoked his right to counsel. Petitioner cites *Michigan v. Harvey*, 494 U.S. 344 (1990) (citing *Patterson v. Illinois*, 487 U.S. 385 (1988) and *Michigan v. Jackson*, 475 U.S. 625 (1985) as support for this principle. The State of Louisiana asserts that petitioner's position is contrary to the underlying foundations set forth in this Court's jurisprudence.

In *Michigan v. Jackson,* 475 U.S. at 626, 636, this Court specifically noted the fact that the petitioner "requested" counsel at his arraignment. This Court discussed the rationale of *Edwards v. Arizona*, 451 U.S. 477 (1981), stating that it was "grounded in the understanding that the *assertion* of the right to counsel is a significant event". (Emphasis added.) In this case, Montejo did not make a request or assertion for counsel at the 72 hour hearing. The district court merely appointed the Indigent Defender Board to represent him. In fact, when asked by the detective on the morning of September 10 if he had obtained counsel, Montejo denied having counsel.

In *Patterson,* 487 U.S. at 290, post-indictment police interrogation was at issue. Although there was no doubt that petitioner was entitled, under the Sixth Amendment, to the assistance of counsel, in footnote 3, the Court noted "as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him". The Court found that the petitioner, "at no time sought to *exercise* his right to have counsel present". (Emphasis added.) The decision in *Michigan v. Jackson* "turned on the fact that the accused had *asked* for the help of a lawyer in dealing with the police". (Emphasis added.) *Patterson,* 487 U.S. at 290-291. While petitioner argues in his brief herein that his silence constituted acceptance of the appointment, such a silence should not be equated with a request or assertion for counsel necessary under *Michigan v. Jackson.* In fact, Montejo was not required to accept such appointment, but could have instead hired a counsel of his own choosing, or under certain circumstances, chosen self-representation.

In *Maine v. Moulton,* 474 U.S. 159, 170-171 (1985), the Court held that once the right to counsel has attached *and* been asserted, the State has an affirmative obligation to respect and preserve the accused's choice to seek such assistance.

Moreover, in *Moran,* 475 U.S. at 430, the Court rejected an argument that the *existence* of an attorney-client relationship somehow triggered the Sixth Amendment right to counsel, noting that the "Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor".

The precedent in *Michigan v. Jackson* and its progeny has turned on the *invocation* or *assertion* by a suspect of his Sixth Amendment right to counsel, which is consistent with the principles enunciated by the Court. These principles of protecting an accused's right to counsel are balanced against society's interest in police investigations. *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991). As the Court recognized in *Texas v. Cobb*, 532 U.S. 162, 171-172 (2001), the "Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects". "Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser. Admissions of guilt resulting from valid *Miranda* waivers 'are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.' " *Texas v. Cobb,* 532 U.S. at 172, citing *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991) (quoting *Moran v. Burbine, supra.*)

In addition to the balancing of an accused's rights and societal interest, another purpose behind the *Michigan v. Jackson* rule is to provide a deterrent to police badgering defendants into waiving the right. *McNeil*, 501 U.S. at 177, *Harvey*, 494 U.S. at 350. The requirement of an assertion of the right by a defendant is essential to both purposes of the *Michigan v. Jackson* rule. Such an affirmative assertion clearly notifies the police of a defendant's election to invoke his right to counsel. It provides a logical and definite line at which the police must stop communication with a defendant. Yet, it does not inordinately impinge upon the societal interest in obtaining information regarding a crime.

A clear and unequivocal assertion or invocation of the right to counsel should be necessary to invoke the prophylactic rule of *Michigan v. Jackson*, because of the harsh consequences which flow from such rule, consequences which negate or diminish the societal need to convict and punish criminals. This Court has recognized the ability of defendants to waive their Sixth Amendment right to counsel after attachment of the right. In *McNeil,* 501 U.S. at 181, the Court rejected the argument that police were precluded from questioning a defendant once he was formally charged with a crime. The fact that such suspects would be "unapproachable . . . even though they have never expressed any unwillingness to be questioned" was contrary to the societal interest in punishing criminal activity. Such an absolute bar has never been advocated by this Court.

The *Michigan v. Jackson* protections "should apply only where a suspect has made a clear and unambiguous assertion of the right not to speak outside the presence of counsel, the same clear election required under *Edwards*. . . It is quite unremarkable that a suspect might want the assistance of an expert in the law to guide him through hearings and trial, and the attendant complex legal matters that might arise, but nonetheless might choose to give on his own a forthright account of the events that occurred. A court-made rule that prevents a suspect from even making this choice serves little purpose". *Texas v. Cobb,* 532 U.S. at 176 (Kennedy, J., concurring).

In this case, Montejo did not invoke or assert his right to counsel.[3] Although petitioner relies solely upon his own self-serving testimony at trial that he made such a request, the officers who testified at the both the hearing on the motion to suppress and the trial stated that not only did Montejo not request counsel, but he denied having counsel when asked by one of the investigating officers, just prior to the request to accompany the officers to the bridge. Instead, he freely elected to accompany the police, fulfilling his earlier offer to lead them to the murder weapon and attempting to bolster his claims of lack of intent to commit this crime. Under such circumstances, *Michigan v. Jackson* should not prohibit the voluntary statements made by Montejo in the letter at issue.

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[3] On page 31 of Petitioner's Brief, petitioner argues facts which the State submits relate to a separate issue which is not before this Court. Petitioner states that he repeatedly made clear to interrogators that he did not choose to deal with them in the absence of a lawyer. However, as to the first alleged instance of petitioner's statements which he alleges occurred shortly after he was picked up for questioning, the officers testified that he did not request an attorney. (State Court Record at pp. 962-963 and 1022). With respect to the second instance, petitioner asked for an attorney during the videotaped interview. Petitioner alleged his rights were violated by the introduction of such videotaped interview after he asserted those rights. However, the Louisiana Supreme Court found that Detective Morse properly "terminated the interview and scrupulously honored the petitioner's request". The Court further found that the petitioner retracted his request for counsel, re-initiating the discussions with the detectives. He subsequently was found to have freely and voluntarily waived his rights. The admission of the videotaped confession was upheld and is not before this Court. All of these alleged statements by Montejo were made prior to the 72 hour hearing at issue.

2. The requirement that a petitioner assert his right to counsel does not present new or unworkable procedures

While petitioner argues that the ruling by the Louisiana Supreme Court is unfair and not administrable, it only requires that a petitioner express his desire to exercise his right to counsel in a manner that is sufficiently unambiguous, just as the Court required in *Edwards v. Arizona* for Fifth Amendment purposes. As this Court stated in *Patterson v. Illinois*, 487 U.S. at 296, *Miranda* warnings sufficiently apprise a petitioner of the nature of his Sixth Amendment rights and of the consequences of abandoning those rights. "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer and that he was aware of the state's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law. . ." *Patterson*, 487 U.S. at 296. The Court further opined that waiver of the Sixth Amendment right should not be more difficult to waive than the Fifth Amendment right, stating "we have never suggested that one right is 'superior' or 'greater' than the other, nor is there any support in our cases for the notion that because a Sixth Amendment right may be involved, it is more difficult to waive than the Fifth Amendment counterpart". *Patterson*, 487 U.S. at 298-300.

A new procedure, as suggested by petitioner, is unnecessary. As set forth by this Court in *Patterson*, 487 U.s. at 296, *Miranda* warnings sufficiently apprise a defendant of his Sixth Amendment right, and the defendant then has the choice whether or not to speak with officers and has the choice whether or not to assert his right to counsel. Contrary to Montejo's assertion, silence of a defendant will not forfeit a constitutional protection. However, silence should not be equated with an outright bar to all police interrogation once counsel is appointed. Such a holding would be contrary to this Court's prior rulings as discussed above.

B. The Introduction of the Apology Letter Constituted Harmless Error

As argued above, the State of Louisiana submits that the state court correctly allowed the introduction into evidence of the letter written by petitioner, which he asserts herein was obtained in violation of his Sixth Amendment rights. However, the State submits that even if any error is found by this Court with the admission of such letter, any such error was harmless in light of the other overwhelming evidence of petitioner's guilt at trial.

This Court has previously held that the admission of a confession alleged to have been obtained in violation of a petitioner's rights is subject to harmless error analysis. *Milton v. Wainwright*, 407 U.S. 371 (1972) and *Arizona v. Fulminante*, 499 U.S. 279 (1991). The only evidence at issue herein alleged to have been obtained in violation of petitioner's Sixth

Amendment right to counsel is the letter which he wrote to the victim's widow on September 10, 2002. The State submits that the verdict rendered herein was certainly not attributable to any error in the introduction of the letter at issue. The jury had before it approximately four hours of videotaped interviews with Montejo, conducted prior to this time, in which Montejo admitted that he shot Mr. Ferrari when he unexpectedly returned home and interrupted Montejo's burglary of the home. The videotaped confession is not at issue in this Petition, and the admission of such videotaped interviews with Montejo were upheld by the state district court and the Louisiana Supreme Court. Moreover, the uncontradicted testimony of the witnesses at trial placed Montejo at the scene of the crime at the approximate time of the murder, DNA evidence matching petitioner was found under the fingernails of the victim, and photographs taken of petitioner shortly after his arrest shows abrasions on his neck consistent with scratches. The Louisiana Supreme Court noted in its decision the testimony of Dr. Sinha, an expert in molecular biology and DNA analysis, who testified at the trial and "concluded that the victim intentionally scratched petitioner because sample characteristics ruled out DNA transfer by coincidental contact". (Pet. App. 5a).

In addition, the very letter at issue in this appeal which petitioner seeks to exclude from evidence would have nonetheless been available as impeachment evidence, because petitioner testified at the trial of this matter. In *Michigan v. Harvey,* 494 U.S. at 353, this Court held that the prosecution may use a statement taken in violation of the *Jackson* prophylactic rule to impeach a petitioner's false or inconsistent testimony. Accordingly, had Montejo not admitted to the contents of such letter, the State would have been allowed to use the letter for impeachment purposes.

In the event this Court finds that the letter written by Montejo should have been excluded from evidence, the case should be remanded for a determination of whether such error was harmless.

CONCLUSION

For the foregoing reasons, the State of Louisiana submits that the judgment of the Louisiana Supreme Court should be affirmed.

Respectfully submitted:

KATHRYN LANDRY
Counsel of Record
WALTER P. REED
HOUSTON C. GASCON, III
SCOTT C. GARDNER
Post Office Box 82659
Baton Rouge, LA 70884
Telephone: (225) 766-0023

Counsel for Respondent, State of Louisiana

REPLY
BRIEF

⑪ No. 07-1529

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Supreme Court, U.S.
FILED
JAN 6 - 2009
OFFICE OF THE CLERK

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REPLY BRIEF FOR PETITIONER

JELPI P. PICOU
G. BEN COHEN
ROBERT J. SMITH
THE CAPITAL APPEALS PROJECT
636 BARONNE STREET
NEW ORLEANS, LA 70113
(504) 529-5955

DONALD B. VERRILLI, JR.
Counsel of Record
IAN HEATH GERSHENGORN
KATHERINE A. FALLOW
MATTHEW S. HELLMAN
THOMAS H. KIM
ADAM G. UNIKOWSKY*
CAROLINE D. LOPEZ*
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001
(202) 639-6000

*Not admitted in DC; supervised by principals of the firm

BOTH 49EJRA

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The State offers no coherent defense of the Louisiana Supreme Court's ruling that a defendant must either request counsel or affirmatively "accept" appointed counsel to trigger the Sixth Amendment protections of *Michigan v. Jackson,* 475 U.S. 625 (1986). Its brief does not come close to refuting Petitioner's showing that the Louisiana Supreme Court's approach is illogical, unworkable, and unfair. *See* Pet. Br. 20-35. Nor is there merit to the State's perfunctory suggestion that an accused should be required to express a specific desire for counsel's assistance during interrogation in order to trigger Sixth Amendment protection. *Jackson* rejected that argument. 475 U.S. at 632-33. The State does not even acknowledge that its suggestion would require overruling *Jackson*, much less justify such a drastic step.

I. The State Advances No Compelling Argument In Defense of the Louisiana Supreme Court's Approach.

As Petitioner's opening brief demonstrated, the Louisiana Supreme Court's approach to this case has no basis in logic or common sense, or in this Court's precedents. The State's response fails at every level.

1. The State does not even attempt to defend the Louisiana Supreme Court's implausible assumption that an accused who silently accepts appointment of counsel has no desire for counsel's assistance in dealing with the authorities during critical stages of prosecution. In particular, the State does not explain why it is reasonable to expect an accused to do anything other than stand silently while counsel is

appointed at a 72-hour hearing. In Louisiana, as in many other jurisdictions, the system for the appointment of counsel operates routinely upon the premise that an accused who cannot afford a lawyer wants one appointed. It is not structured so as to demand or even to provide an occasion for the accused to respond when counsel is appointed. *See* Br. *Amicus Curiae* of The Louisiana Public Defenders Ass'n ("LPDA Br.") at 4-8.

To obtain the benefit of *Jackson* under the Louisiana Supreme Court's "affirmative acceptance" approach, an accused would have to act in a manner that is manifestly out of keeping with the norms of these proceedings. In many jurisdictions, defendants are admonished not to speak except in response to questions from the court and are warned that anything they say can be used against them. *See United States v. Mullins*, 315 F.3d 449, 455 (5th Cir. 2002) ("routine instructions to defendants regarding the protocols of the court often include the admonition that they are to address the court only when asked to do so"); *see also* Br. *Amicus Curiae* of The Nat'l Legal Aid & Defender Ass'n *et al.* ("NLADA Br."), at 22-25. It would be unreasonable to expect anyone to interject a request for counsel, or an affirmative acceptance of appointment, under such circumstances. It is particularly unreasonable to expect such actions from indigent criminal defendants who, as a group, are poorly educated and have high levels of "learning disabilities and mental impairments." *Halbert v. Michigan*, 545 U.S. 605, 621 (2005).

In short, it defies common sense to infer from a defendant's silence in response to the appointment of counsel that the defendant has elected to go it alone rather than to rely on counsel's assistance during critical stages of the prosecution.

2. The State also fails to address the many practical difficulties inherent in the Louisiana Supreme Court's approach. To begin with, the State cannot deny that the Louisiana Supreme Court's approach will generate an unending flow of cases adjudicating the question of what suffices to trigger the right. The Louisiana Supreme Court required "something more than mere mute acquiescence in the appointment of counsel." Pet. App. 47a (internal quotation marks omitted). The test the Fifth Circuit proposed in *Montoya*, which the Louisiana Supreme Court cited with approval (Pet. App. 47a n.68), was "some kind of positive statement or other action that informs a reasonable person of the defendant's desire to deal with the police only through counsel," even if such a statement falls short of an unequivocal statement such as "I want a lawyer." *Montoya v. Collins*, 955 F.2d 279, 283 (5th Cir. 1992) (internal quotation marks omitted). Would an accused meet either or both of these amorphous standards by nodding approvingly when counsel is appointed? By thanking the presiding magistrate for the appointment? By filling out an affidavit of indigency, the purpose of which is to establish an entitlement to appointed counsel (as occurred in *Michigan v. Jackson*)? By meeting with the appointed lawyer, telephoning the appointed lawyer from prison, writing the appointed lawyer a letter, or by signing a

retention agreement? By responding to police-initiated interrogation with a statement such as "I think I have a lawyer"?

Even worse, the basic factual issues concerning what the accused actually said and did would typically have to be decided in the absence of any reliable contemporaneous record. Thus, an accused's entitlement to the protections of *Jackson* could well depend on whether the local practice is for court clerks to transcribe fully or only summarily what happened during an initial hearing appointing counsel (or whether minute orders are even made in a particular jurisdiction).[1]

The State also fails to respond to Petitioner's point that under the Louisiana Supreme Court's approach pure happenstance will often dictate whether *Jackson* applies. In some states, the law requires magistrates at initial hearings to ask an accused whether he or she wants counsel appointed. *E.g.*, Cal. Penal Code § 859 (2008) (magistrate shall "ask the defendant if he or she desires the assistance of counsel"); N.J. R. Crim. P. 3:4-2(b)(4) (judge must

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[1] Initial hearings are seldom transcribed or recorded. Rather, as *amicus* NLADA explains, "the focus of these initial proceedings is often on processing crowded dockets as efficiently as possible," to the point that defendants are often dealt with *en masse* rather than individually. NLADA Br. at 25-26. Thus, in addition to the disparities in transcription, an accused's entitlement to the protections of *Jackson* could turn on whether the pressures of a relentlessly heavy docket result in magistrates rushing through the procedure, instead of ascertaining whether each individual accused seeks the assistance of counsel.

"ask the defendant specifically whether he or she wants counsel and record the defendant's answer on the complaint"); *see* Br. *Amicus Curiae* of The Nat'l Ass'n of Criminal Defense Lawyers *et al.* ("NACDL Br."), at 14-15; NLADA Br. at 13. In other states, including Louisiana, counsel is appointed automatically upon a showing of (or sometimes the assumption of) indigency on the part of the accused. *See* NACDL Br. at 15; NLADA Br. at 8-13. Under the Louisiana Supreme Court's approach, criminal defendants prosecuted by states in the former category will receive the protection of *Michigan v. Jackson* because they will be asked whether they want the assistance of counsel. But defendants prosecuted in states in the latter category will not be protected because the state-prescribed procedures do not involve any request to the defendant and thus do not elicit any affirmative statement that would trigger *Jackson*.

In addition, in Louisiana and many other states, defendants who are physically or mentally incapacitated do not participate in the 72-hour hearing at all and thus have no opportunity either to request counsel or to affirmatively signal their acceptance of the appointment. La. Code Crim. Proc. Ann. art 230.1(A). There are also significant differences among jurisdictions in terms of whether the defendant appears in person at the initial hearing (or via remote video link), and the extent to which public defender offices can afford to detail lawyers to cover initial hearings – which will affect the likelihood that defendants will be informed that they must request counsel or affirmatively indicate their acceptance of appointed counsel in order to attain the full measure of Sixth Amendment protection. *See* LPDA Br. at 5-6. The State offers no justification for these myriad forms of disparate treatment based on matters of chance and circumstance that would result from the Louisiana Supreme Court's approach.

Finally, and contrary to the State's contention Resp. Br. 13-14, the factual questions and ambiguities created by the Louisiana Supreme Court's approach will leave the police without any clear sense of when they may permissibly initiate interrogation. By contrast, under the "acceptance by appointment" rule, every officer would know that upon appointment, a defendant is now represented and that all communications would have to be either initiated by the defendant or occur in the presence of the defendant's counsel. This bright-line rule provides salutary guidance to all police officers because it requires no additional research on the part of the individual detective. *See Dickerson v. United States*, 530 U.S. 428, 444 (2000); *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (refusing to modify the *Miranda* rule to require additional warnings when a custodial suspect's lawyer is trying to reach the suspect, because doing so would "clearly undermine the decision's central virtue of informing police and prosecutors with specificity . . . what they may do in conducting [a] custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogations are not admissible" (internal quotation omitted; alterations in original); *see also* Pet. Br. 34-35.

3. Given these many problems, it is unsurprising that the State finds no genuine support for its position in this Court's precedents.

In particular, the State's reliance on *Patterson v. Illinois*, 487 U.S. 285 (1988), ignores what the Court actually said in that case. *Patterson* turned on the fact that the defendant had not made an "initial election" to rely on counsel's assistance during the critical stages of the criminal process, but instead had decided to "go it alone." *Id.* at 291. The absence of that "initial election" was critical to the Court's decision to uphold the defendant's waiver in response to police-initiated interrogation. At the same time, the Court made clear that "a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect" once a defendant "has a lawyer." *Id.* at 290 n.3. Indeed, the Court noted that "the analysis changes markedly once an accused even *requests* the assistance of counsel," making clear that the significance of the request was that it entitled the accused to be treated as though he already had a lawyer for Sixth Amendment purposes, not that the request itself had any independent significance for defendants who already have lawyers. *Id.* (emphasis in original). *See also Michigan v. Harvey*, 494 U.S. 344, 352 (noting that "once a defendant obtains or even requests counsel . . . analysis of the waiver issue changes"); *Carnley v. Cochran*, 369 U.S. 506, 513 (1962); Pet. Br. 25-26. An accused who has been appointed counsel can hardly be said to have made an "initial election" to "go it alone."

The State's reliance on *Moran v. Burbine*, 475 U.S. 412 (1986), is even more perplexing. The State places great stock in the fact that *Moran* "rejected an argument that the *existence* of an attorney-client relationship somehow triggered the Sixth Amendment right to counsel." Resp. Br. 12-13. But the critical distinction at issue in *Moran* – which the State ignores – was between interrogations that occur before adversarial proceedings have commenced and those that occur after. As *Moran* made clear, in the former situation the Sixth Amendment right has not yet attached, so a defendant would have no basis for arguing that an alleged interference with the attorney-client relationship violated the defendant's right to counsel. *Moran*, 475 U.S. at 428-29. But "once the right *has* attached" – as it indisputably had here – "it follows that the police may not interfere with the efforts of a defendant's attorney to act as a 'medium' between [the suspect] and the State during the interrogation." *Id.* at 428 (emphasis in original; internal quotation marks omitted; alterations in original). The Court emphasized this very point again in *Patterson*, 487 U.S. at 296 n.9, noting that "in the Sixth Amendment context" the waiver the police obtained in *Moran* would not be valid, even though it satisfied *Miranda*.

The same is true about *Maine v. Moulton*, 474 U.S. 159 (1985). In *Moulton*, the defendant appeared in court, "represented by retained counsel," to enter a plea of not guilty. 474 U.S. at 162. Later, a cooperating witness surreptitiously tape-recorded his conversations with the defendant. The Court held that the use of those recordings at trial violated the Sixth Amendment because the right had attached and the defendant was represented by counsel at the time the secret recordings were made. *Id.* at 176. The Court ascribed no significance to the question whether the defendant had invoked the right to counsel's assistance. The prosecution's conduct violated the Sixth Amendment because it denied the defendant the opportunity to consult with his counsel and the right to have his counsel present during the interrogation.[2] *Id.* at 176, 177.

The State's reliance on *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991), is similarly misplaced. Quoting *McNeil*, the State suggests that the consequence of Petitioner's position is that suspects would be "'unapproachable . . . even though they have never expressed any unwillingness to be questioned.'" Resp. Br. 14 (quoting *McNeil*, 501 U.S. at 181) (ellipses in original). But that quotation omits the critical limiting language making clear that the Court was talking about the ability of the police to approach a suspect for "other crimes" for which the suspect had not been charged. *McNeil*, 501 U.S. at 181. In *McNeil*, it was undisputed that the police could not approach an accused outside counsel's presence to initiate interrogation regarding an offense for which the accused was being prosecuted. *Id.* at 175. Notably, the defendant in *McNeil* accepted counsel by appointment, and there was no indication that he ever requested counsel. *See State v. McNeil*, 454 N.W.2d 742, 744 (Wis. 1990) ("The defendant appeared at his initial appearance [for the charged offense]. There he was represented by an attorney from the public defender's office. The record does not reveal whether he requested counsel at his initial appearance, only that he appeared with counsel at that appearance.").

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[2] The fact that *Moulton* did not turn on whether the defendant had invoked his right to counsel gives the lie to an argument made by the State *amici*. They contend that *Patterson's* acknowledgement that a "distinct set of constitutional safeguards" once an accused "has a lawyer" still requires that the defendant affirmatively invoke his right to counsel to get those protections. Br. *Amicus Curiae* of N.M. *et al.* ("States Br.") at 24 (citing *Patterson*, 428 U.S. 290 n.3). The *amici* base their claim on the fact that *Patterson* cites *Moulton* (along with *Jackson*) in this passage. *Id.* But since neither *Moulton* nor *Jackson* turned on whether the defendant had, as opposed to requested, a lawyer, the *amici's* argument fails.

Far from supporting the State, the Court's discussion of *Jackson* in *McNeil* confirms that the Louisiana Supreme Court's approach is irreconcilable with this Court's precedents. *McNeil* explained that the point of *Jackson* was not that a defendant's request to rely on counsel at a first court appearance amounted in fact to an expressed desire to have counsel present during later interrogation, "but that it *did not have to*, since the relevant question was not whether the *Miranda* 'Fifth Amendment' right had been asserted, but whether the Sixth Amendment right to counsel had been *waived*." *McNeil*, 501 U.S. at 179. The Court further explained that because "our 'settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel, . . . we *presume* that the defendant requests a lawyer's service at every critical stage of the prosecution.'" *Id.* (quoting *Jackson*, 475 U.S. at 633 (emphasis added by *McNeil* Court; alterations in original)). What the State advocates here is precisely the opposite: inferring from the defendant's silence a presumption that the defendant has chosen to go it alone. That approach flies in the face of *Jackson*'s core holding, as well as the well-established principle that presuming waiver of the Sixth Amendment right to counsel "from a silent record" is impermissible. *See Carnley*, 369 U.S. at 516 (assuming from a silent record that the trial judge made an "offer of counsel which the petitioner declined" or that the defendant "was willing to forego" his right to counsel would be "wholly at war with the standard of proof of waiver of the right to counsel").

Thus, the Louisiana Supreme Court's decision cannot be affirmed without overruling the core holding of *Michigan v. Jackson*. As will be shown, that is a step this Court should not take.

II. This Court Should Not Overrule *Michigan v. Jackson*.

In addition to offering its failed defense of the Louisiana Supreme Court's reasoning, the State also suggests (though only in an offhand way) that the Sixth Amendment should provide an accused no greater protection than does the Fifth Amendment rule of *Edwards v. Arizona*, 451 U.S. 477 (1981). Resp. Br. 14-16. The State does not acknowledge that its suggestion would require wholesale revision of Sixth Amendment law, including overruling *Michigan v. Jackson*. Nor does the State point to any "special justification" that is required for this Court to overrule its longstanding precedent. *Dickerson*, 530 U.S. at 443. Therefore, and for the reasons that follow, this case provides no basis for overruling *Michigan v. Jackson*.

1. The key holdings of *Michigan v. Jackson* are now more than two decades old and have been applied without difficulty in myriad cases. But while the State's argument cannot be squared with *Jackson*, the State has not asked this Court to overrule the precedent. That omission is sufficient by itself to require adherence to *stare decisis*. *United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 855, 856 (1996). Nor has the State attempted to demonstrate the required "special justification" for departing from *stare decisis*. *See Dickerson*, 530 U.S. at 443 ("[T]he doctrine [of *stare decisis*] carries such persuasive force that we have always required a departure from precedent to be supported by some special justification."); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). The State makes no effort to show that *Jackson* has proven unworkable in practice or has had its legal foundations destroyed or substantially eroded by other developments in the law or is otherwise an appropriate candidate for overruling. *See Dickerson*, 530 U.S. at 443 (finding no special justification given that "doctrinal underpinnings" of precedent remained intact); *Randall v. Sorrell*, 548 U.S. 230, 243-44 (2006) (plurality) (special justification arises where precedent is "legal anomaly" or "circumstances have changed . . . radically"); *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965) (special justification arises

where precedent is "unworkable in practice"). Overruling a precedent of this Court is a serious matter. It should not be contemplated where, as here, a litigant makes no effort to show that such a drastic step is warranted.[3]

2. *Jackson* should not be reconsidered in this case. Petitioner recognizes that three members of the Court have questioned the logic of the broad rule of *Jackson* on the ground that in some circumstances it may "override" the "free choice of a suspect [whether] to remain silent" when interrogated in the absence of appointed counsel and thus may work *against* "the *Edwards* rule[, which] operates to preserve the [suspect's] free choice" *Texas v. Cobb*, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring). For this reason, the Court might find occasion to reconsider the parameters of *Jackson*'s ban on interrogation in a case where the application of that ban *does* "override" a suspect's "free choice" to deal with the police directly rather than through the mediation of counsel. Any such change to *Jackson* would require a careful weighing of any harm to the interests identified in Justice Kennedy's concurrence as compared to the values of adhering to *stare decisis* and the benefit of *Jackson*'s clear and administrable rule for regulating police conduct. *Cf. Dickerson*, 530 U.S. 428.

But this case presents no occasion for making such a reassessment. On the facts, this case is the polar opposite of the kind of "free choice" situation before the Court in *Cobb*. The defendant in that case had been represented by counsel for more than a year before he made the confession that was the subject of that case. He obviously had ample opportunity to consult with his appointed counsel about whether and how to deal directly with the investigating authorities. He was free on bond during the period in question, and thus not subject to the coercive and debilitating pressures that long-term incarceration inflict. And there was no indication that Cobb was misled about the availability of counsel or otherwise subjected to aggressive interrogation techniques. *Cobb*, 532 U.S. at 165-66.

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[3] Nor did the State advance any such argument in the Louisiana Supreme Court.

Here, in contrast, the police acted "in a calculated way to undermine" the protections of *Edwards*. *Cf. Missouri v. Seibert*, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring). When the police took Montejo on the excursion on September 10th to find the murder weapon, they likely knew (or were properly charged with the knowledge) that Montejo already had a lawyer. It is difficult to believe that none of the several officers involved in the investigation were aware that Montejo had been removed from jail on the morning of the 10th to attend his 72-hour hearing. Moreover, Detective Morse, who instructed Detectives Jerry Hall and Dale Galloway to check Montejo out of custody on September 10th and take him to search for the weapon, R. 2582-84 (Trial Tr. Mar. 7, 2005), was the officer who transported Montejo from Gretna on September 6th and conducted the initial custodial interrogation of Montejo on that date. Pet. App. 9a-

10a. By the time he instructed Detectives Hall and Galloway to check Montejo out on the 10th, Detective Morse surely knew that more than 72 hours had elapsed since his first encounters with Montejo.[4] At a minimum, therefore, Detective Morse had every reason to think Montejo was represented by counsel, and in any case that knowledge would be imputed to him and the other officers who interrogated Montejo. *Jackson*, 475 U.S. at 634 & n.8 (citing *Moulton*, 474 U.S. at 170-71). Thus, the conduct of the police on September 10th is hard to understand as anything other than an effort to elicit further incriminating testimony from Montejo before he had a chance to consult his newly appointed lawyer.

The officers' dealings with Montejo on the 10th reinforce that conclusion. According to the State, the record shows that "Montejo did not invoke or assert his right to counsel" in response to the officers' effort to initiate further interrogation. Resp. Br. 15; *id.* 4-5. But the State ignores Montejo's testimony that, when Detectives Hall and Galloway approached him on September 10th, he told them "I don't really want to go with you . . . I got a lawyer appointed to me. . . . I think I got a lawyer appointed to me" – as well as his further testimony that the officers sought to dissuade him from relying on counsel by telling him "No, you don't . . . I checked, you don't have a lawyer appointed to you." Pet. App. 49a; JA 242 (testimony of Montejo). The State attempts to dismiss Montejo's testimony as "self-serving." Resp. Br. 15. But the Louisiana Supreme Court did not reject that testimony.[5] *See* Pet. App. 21a nn.46 & 47; *id.* at 49a-50a. The court merely observed that, in its view, even if the detectives had falsely told Montejo he had no lawyer, it would not have invalidated Montejo's subsequent *Miranda* waiver because the facts did not rise to the level of *Moran v. Burbine*. Pet. App. 49a n.69.[6]

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[4] Every criminal defendant in Louisiana is required to be brought before a judge for the purpose of appointment of counsel within 72 hours of arrest. La. Code Crim. Proc. Ann. art. 230.1(A).

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[5] The State repeatedly refers to the purported testimony of "the detectives" or "the officers" to the effect that, when the officers asked Montejo on September 10, 2002 whether he had obtained counsel, he told them he had not. Resp. Br. 4-5, 15. In fact, only one of the officers involved – Detective Hall – testified that Montejo stated that he did not have counsel, Pet. App. 21a & n. 46. Detective Galloway, who was also present for the September 10th interrogation, did not testify at the hearing on the motion to suppress or at trial. Pet. App. 23a n.49. Although Detective Johnny Morse instructed the detectives on September 10, 2002 to "check [Montejo] out of the jail and go search for a weapon," R. 2582 (Trial Tr. Mar. 7, 2005), he did not testify about any statements by Montejo concerning whether he had counsel.

Moreover, Detective Hall's testimony was artfully crafted. He testified that he asked Montejo whether a lawyer had contacted him, not whether he had been appointed a lawyer. What Hall claims Montejo said was that "he *had not been contacted* by an attorney." Pet. App. 50a (emphasis added). Of course, the very reason that Montejo had not been contacted by counsel is that his attorney's efforts to reach him were thwarted by the decision to remove him from his jail cell and interrogate him immediately after the 72-hour hearing. *Id.* 21a n.46 ("Detective Hall was confronted by indigent defense counsel when he returned Montejo to jail."); *see also* JA 180-81 (testimony of Detective Hall) (explaining that, when he finally returned Montejo to the station house, "the pagers [had been] going off" and Montejo's attorney was "pretty upset that I had been out with Montejo that afternoon . . .").

Moreover, the prior efforts of the police to pressure Montejo into revoking his request for counsel are highly probative in evaluating what transpired on September 10th. By that time, the police had already actively dissuaded him from seeking counsel on two previous occasions.[7] Pet. Br. 2-5. Although the Louisiana Supreme Court ultimately upheld the lawfulness of that conduct, it recognized that the officers' actions "merit[ed] close scrutiny," Pet. App. 34a, and that Montejo was "visibly upset" after he supposedly revoked his request for counsel's assistance (in an exchange that, inexplicably, was not captured on the videotape of the interrogation), *id.* at 16a.

In sum, this is manifestly not the sort of case hypothesized in Justice Kennedy's *Cobb* concurrence, where "a suspect might want the assistance of an expert in the law to guide him through hearings and trial . . . but nonetheless might choose to give on his own a forthright account of the events that occurred." 532 U.S. at 177. Whether or not a retraction of the *Jackson* rule in such a case would commend itself to the Court, Montejo's case is an altogether inappropriate one in which to consider that question. *No* plausible interpretation of the Sixth Amendment could support the admission of Montejo's confession given that the police obtained it by falsely telling him that he did not have a lawyer and by removing him from jail before his lawyer could meet with him. Pet. Br. 31-32.

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[6] Of course, even under the Louisiana Supreme Court's approach, Montejo's statement to the officers was surely "[s]omething more than mere mute acquiescence," sufficient to constitute acceptance of appointed counsel. Pet. App. 47a.

[7] The State questions Montejo's testimony regarding his requests for counsel at his initial detention in Gretna, stating that the officers testified to the contrary. Resp. Br. 15 n.3. But the trial court made no credibility findings as to the statements concerning Montejo's first request for counsel at the Gretna police station. The Louisiana State Supreme Court noted without questioning Montejo's testimony that officers at Gretna told him that "they would not recommend" obtaining a lawyer. Pet. App. 10a n.19.

3. The above considerations should dispose of the suggestion made by an *amicus* group consisting of a minority of States that *Jackson* should be overruled. Under the *amici*'s proposed rule it would not matter for Sixth Amendment purposes whether the accused had obtained or had requested a lawyer; instead, the police would be free to interrogate the accused unless and until he clearly and specifically indicated he did not wish to speak to the police without the aid of counsel. States Br. at 28-29. The *amici*'s rule would even apply where – as here – the police initiated their interrogation before the accused had received any advice from counsel at all. The Court should reject the *amici*'s invitation.

The *amici* contend that there is no warrant for granting an accused any protections beyond those that *Edwards* already provides under the Fifth Amendment. States Br. at 29, 32-33. Accepting that argument would require this Court not only to overrule *Jackson* but also to disavow an entire line of cases – stretching before and after *Jackson* – recognizing that once a prosecution begins, the "Sixth Amendment guarantees the accused . . . the right to rely on counsel as a 'medium' between him and the State." *Moulton*, 474 U.S. at 176. For "'[i]t is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Id.* at 170 (quoting *United States v. Gouveia*, 467 U. S. 180, 189 (1984) (quoting *Kirby v. Illinois*, 406 U. S. 682, 689 (1972))).

Thus, for example, although the police are permitted under the Fifth Amendment to question a defendant without telling him his attorney is trying to reach him and are also permitted to use an undercover informant to elicit information in the absence of an attorney, the Sixth Amendment forbids those practices once the state's prosecution begins. *Moran*, 475 U.S. at 428 (defendant must be informed of attorney's attempt to reach him); *United States v. Henry*, 447 U.S. 264, 274-75 (1980) (no undercover eliciting of information). The common thread in all of these cases is that the Sixth Amendment gives the accused a qualitatively different right to deal with the State through counsel than he had prior to initiation of formal charges.[8]

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[8] The *amici* wrongly contend that *Patterson* establishes that the protections afforded to defendants in post-arraignment interrogations are no more robust than in pre-arraignment interrogations. As noted at page 7 *supra*, *Patterson* specifically reaffirmed that where a defendant has "retained [a lawyer] or accepted [a lawyer] by appointment," the Sixth Amendment bars the police from initiating questioning of the defendant.

The focus of these cases on the importance of counsel in the face of a prosecution demonstrates why it would be improper to reduce the Sixth Amendment's protections to those of *Edwards*. *Jackson* requires that the police initiate an interrogation of a counseled defendant only when his lawyer is present. The *Edwards* rule would allow the police to bypass the defendant's lawyer in the hope of getting the defendant to waive his right to counsel. The *Edwards* rule makes sense in the Fifth Amendment context given that most people interrogated by the police lack lawyers in the first instance. Moreover, to the extent a suspect wishes the aid of counsel to exercise his Fifth Amendment right against self-incrimination, it is appropriate that he make the request in conjunction with an interrogation, which is the precise scenario in which the right is most likely to come into play.

The Sixth Amendment calculus is different. By definition, the Sixth Amendment's protections come into force only once the prosecution has begun, and they are broader than protecting against mere self-incrimination. The Sixth Amendment guarantees the accused "the Assistance of Counsel for his defence." U.S. Const. amend. VI. It thus presupposes that the defendant will need and use counsel in responding to "the prosecutorial forces of organized society." *Moulton*, 474 U.S. at 170 (internal quotation marks omitted). The defendant will not have the full measure of that protection if

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487 U.S. at 290 n.3. That is a flat rejection of the rule and rationale that *amici* advance here.

the police can bypass his counsel to seek a waiver for interrogation, or for any other critical stage of the prosecution. *Moran*, 475 U.S. at 428 ("[W]e readily agree that once the [Sixth Amendment] right has attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a 'medium between [the suspect] and the State' during . . . interrogation.") (citation omitted); *Coleman v. Alabama*, 399 U.S. 1, 7 (1970) ("This Court has held that a person accused of crime 'requires the guiding hand of counsel at every step in the proceedings against him.'") (quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932)).

While the *amici* contend that the mere fact that a defendant asks for counsel does not necessarily indicate a desire for assistance with interrogation, that view minimizes counsel's role under the Sixth Amendment. Absent counsel, most defendants will have little sense of their optimal strategy in dealing with the forces of the prosecution now marshaled against them. They likely will not be able to distinguish in advance among the "critical stages" they will face, or to anticipate the advice that counsel would give in mounting a defense. It is unreasonable and inconsistent with counsel's role as a "medium" to assume that a defendant intends to rely on counsel for some but not all of these critical stages. And it frustrates the Sixth Amendment right to allow the police to meet alone with a counseled defendant in the hopes of getting him to waive his right to counsel.

The facts of this case make this point with crystalline clarity. Here the police told Montejo he had no lawyer with whom to consult and prevented counsel from meeting with Montejo by taking him out of the police station to search for the murder weapon. Montejo thus had no opportunity to learn from his lawyer about the assistance he could render at each stage of the proceeding, let alone to discuss whether he would be best served by talking with the police alone. Allowing the police to interpose themselves between Montejo and his attorney before Montejo had the benefit of any counsel whatsoever grossly undermined his Sixth Amendment rights.

Of course a defendant always remains free under *Jackson* to initiate a conversation with the police. The *amici* are thus incorrect to imply that *Jackson* tramples on society's interest in having guilty defendants confess to their crimes. States Br. at 17, 20. The defendant who believes that it is in his best interest to meet with the police alone – whether to confess or to present his own version of the events – may always do so. *Jackson* prohibits (properly) the police only from initiating an interrogation once the accused has counsel.

Moreover, *amici* ignore the many practical problems that would follow from adopting their proposed approach. There are many critical stages in a prosecution prior to trial, including pretrial hearings, lineups, psychiatric exams, and various types of arraignments. *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2594 (2008) (Alito, J., concurring). If the States' rule were adopted, the police would be required to give a modified *Miranda* warning before each stage in order to determine whether or not the defendant wished to have the benefit of his counsel during that particular critical stage. Suffice it to say that this approach would require the creation of new and complicated doctrines that would surely generate substantial litigation.

Finally, there is no basis for accepting *amici's* contention that *Jackson* can safely be overruled as a practical matter because there is no longer a risk today of the police badgering a defendant into waiving his right to counsel. The facts of this case refute the point.

III. The Error Is Not Harmless.

Even if this Court were to depart from its usual practice and consider the harmless error argument raised by the State, *see, e.g., Neder v. United States*, 527 U.S. 1, 25 (1999); *Dobbs v. Zant*, 506 U.S. 357, 359 n.* (1993) (per curiam), that argument provides no basis for affirmance. The State does not even cite – much less attempt to satisfy – the governing *Chapman* standard, which provides that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless, beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). Under this standard, the error in this case was not harmless.

1. As described in Petitioner's opening brief, the evidence elicited as a result of the officers' illegal interrogation was highly damning. Pet. Br. 38-39. Montejo's letter is tantamount to a confession that he committed the crime. No other type of evidence is

more probative of guilt. *See Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (holding that "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct") (alterations in original). The confession was particularly damaging here because of the lack of physical evidence showing that Montejo had committed the murder. Pet. Br. 38. Moreover, the prosecution relied upon the letter repeatedly during the trial, raising it during the opening statement, *see* JA 166, R. 2258-62 (Trial Tr. Mar. 5, 2005), the testimony of a key defense witness *see* J.A. 252, and the closing statement, *see* JA 290-91, R. 2834 (Trial Tr. Mar. 9, 2005).

2. Nevertheless, the State contends the error was harmless on three grounds. It first notes that "the uncontradicted testimony of the witnesses at trial placed Montejo at the scene of the crime at the approximate time of the murder" and that Montejo's DNA was discovered under the victim's fingernails. Resp. Br. 18. But Montejo conceded at trial that he was in the victim's house at the time of the murder and was involved in a physical altercation with the victim. JA 209-11. What he denied was shooting the victim. *Id.* No witness testified that Montejo shot the victim and the prosecution presented no evidence at trial linking Montejo to the murder weapon. Pet. Br. 10-11, 38.

Next, the State argues that the letter was merely cumulative. Resp. Br. 18. But Montejo's initial "confession" was elicited at 3:45 a.m., after almost twelve hours of interrogation. Pet. Br. 2-6, R. 2350 (Trial Tr. Mar. 6, 2005), 2706-07 (Trial Tr. Mar. 8, 2005), 2730-31 (Trial Tr. Mar. 8, 2005). Montejo confessed only after repeatedly denying that he committed the crime and insisting he would not "take the rap" for something he did not do. Pet. Br. 5, State's Ex. 17-A (DVD version of the 2d interview with Jesse J. Montejo). Moreover, during that twelve-hour interrogation, Montejo requested a lawyer and rescinded his request only after his interrogators responded to his request by charging him with first-degree murder. Pet. Br. 3-4. At trial Montejo argued that his initial confession was coerced, R. 2780-82 (Trial Tr. Mar. 6, 2005), and in the absence of the letter as corroborating evidence of guilt, the jury may well have believed him.

Moreover, the State's argument is undermined by *Fulminante*, a case on which the State relies. In that case, the defendant confessed to a murder twice: once to an informant and once to the defendant's wife. 499 U.S. at 296-97. The jury was told of both confessions. *Id.* The Court concluded that the confession to the informant should have been suppressed, and, notwithstanding that there was no dispute that the confession to the defendant's wife was properly admitted into evidence, it held that the erroneous admission of the confession to the informant was not harmless. *Id.* at 296. The Court emphasized that a reviewing court must "exercise extreme caution before determining that the admission of the confession at trial was harmless," *id.*, and observed that in the case at hand, there was little physical evidence of the crime and "a successful prosecution depended on the jury's believing the two confessions," *id.* at 297. It therefore concluded that the confessions may have "reinforced and corroborated each other," rendering the admission of the confession to the informant not harmless. *Id.* at 299.

The same analysis applies here. There was no physical evidence or testimony directly tying Montejo to the shooting; a successful prosecution depended upon the jury believing Montejo's two confessions. The letter surely "reinforced and corroborated" the initial confession and assuaged the jury's doubts as to whether the initial confession was coerced. Under these circumstances, *Fulminante* requires that the error not be considered harmless.

Finally, the State speculates that even if the trial court had correctly determined that the letter should have been suppressed, the prosecution might still have used it as impeachment evidence under *Michigan v. Harvey*, 494 U.S. 344 (1990). This contention is meritless. The prosecution did not use the letter to impeach Montejo at the trial that actually occurred; it is at best unclear whether the prosecution would have used the letter to impeach Montejo at a hypothetical different trial in which the letter was suppressed. Even if the prosecution did use the testimony as impeachment evidence, the jury would have been instructed that it could not consider the letter as direct evidence that Montejo committed murder, significantly diminishing its probative value. Montejo might not have testified if he knew that doing so would allow the State to impeach him with highly damning evidence that would otherwise have been excluded. Finally, and most importantly, it is irrelevant whether Montejo would have been convicted at a hypothetical different trial in which the letter was used only for impeachment. The harmless-error inquiry "is not whether the legally admitted evidence was sufficient to support" the conviction, "but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988) (quoting *Chapman*, 386 U.S. at 24)); *see also Fulminante*, 499 U.S. at 296 ("[I]t must be determined whether the State has met its burden of demonstrating that the admission of the confession . . . did not contribute to [the] conviction."). What happened in Montejo's actual trial was the exact opposite of what happened in the State's hypothetical alternative trial – the State *did* use the letter as direct evidence of Montejo's guilt but *did not* use the letter to impeach Montejo. In the trial that actually took place, the erroneous admission of the letter was not harmless.

CONCLUSION

The judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

DONALD B. VERRILLI, JR.
Counsel of Record
IAN HEATH GERSHENGORN
KATHERINE A. FALLOW
MATTHEW S. HELLMAN
THOMAS H. KIM
ADAM G. UNIKOWSKY*
CAROLINE D. LOPEZ*
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001
(202) 639-6000

JELPI P. PICOU
G. BEN COHEN
ROBERT J. SMITH
THE CAPITAL APPEALS
PROJECT
636 BARONNE STREET
NEW ORLEANS, LA 70113
(504) 529-5955

January 6, 2009

* Not admitted in DC; supervised by principals of the firm

AMICUS
CURIAE
BRIEF

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Supreme Court, U.S.
FILED
NOV 24 2008
OFFICE OF THE CLERK

No. 07-1529

In the Supreme Court of the United States

JESSE JAY MONTEJO,
Petitioner

v.

STATE OF LOUISIANA,
Respondent.

**On Writ of Certiorari to the
Louisiana Supreme Court**

BRIEF OF *AMICI CURIAE* THE LOUISIANA PUBLIC DEFENDERS ASSOCIATION IN SUPPORT OF PETITIONER

Daniel A. Curto Rahul Rao McDERMOTT WILL & EMERY LLP 28 State Street Boston, MA 02109 617-535-4000	G. Paul Marx, Executive Counsel *Counsel of Record* LOUISIANA PUBLIC DEFENDERS ASSOC. PO Box 82394 Lafayette, LA 70598 337-237-2537

Counsel for the Amici Curiae

November 24, 2008

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INTEREST OF THE *AMICI CURIAE*[1]

The Louisiana Public Defenders Association consists of statutorily created offices charged with the responsibility of representing indigent defendants in Louisiana. Because of their unique role in the criminal justice system, *amici curiae* can provide this Court with insight regarding the impact of the Louisiana Supreme Court's decision in *Montejo v. State of Louisiana,* 974 So2d. 1238 (La. 2008).

Amici curiae know first hand the practices and procedures in judicial districts across Louisiana regarding the appointment of counsel to indigent defendants. Although local procedures vary throughout Louisiana, it is a common thread that many work counter to the notion that a defendant will be given the opportunity to provide affirmative acceptance of appointed counsel. The practical effect of the interaction of these local practices and the affirmative acceptance requirement espoused by the Louisiana Supreme Court will be to deny counsel to indigent defendants in contradiction of Sixth Amendment rights.

Further, an affirmative acceptance requirement will directly impact an already over-burdened public defender system. The indigent defense system throughout Louisiana is chronically under-resourced, and has only gotten worse since Hurricanes Katrina and Rita.[2] As a result of the Louisiana Supreme Court's holding in *Montejo*, Louisiana public defenders will need to further stretch those limited resources by employing more staff, and spending more time at initial hearings to zealously guard against waiver and in motions practice to defend affirmative acceptance.

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to this brief.

Amici curiae have a strong institutional interest in the reversal of the Louisiana Supreme Court's affirmative acceptance requirement.

SUMMARY OF ARGUMENT

The Louisiana Supreme Court's approach of requiring an affirmative acceptance of counsel is unworkable under the practices used in Louisiana's local judicial districts, and will result in the denial of counsel in violation of the Sixth Amendment. Although the proceedings governing initial appearance and assignment of counsel vary throughout Louisiana's districts, a common thread is that many do not seek affirmative acceptance from indigent defendants. For example, many appoint counsel automatically or through an indigency investigator. An affirmative acceptance requirement will have the practical effect of denying these indigent defendants counsel because they were never asked to accept counsel and will not understand the necessity of this formality.

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[2] *See State v. Citizen*, 898 So.2d 325, 327, 335 n.11 (La. 2005) (pointing out that the state legislature has "failed to provide adequate appropriation to support" indigent defense; citing testimony from director of state Indigent Defense Assistance Board "that the state reduced his agency's funding by 25% after its first year of existence, then failed to restore funding in the seven subsequent years"); National Legal Aid & Defender Association, *A Strategic Plan to Ensure Accountability & Protect Fairness in Louisiana's Criminal Courts* (September 2006) at iv (explaining that "it would be disrespectful to those . . . individuals trying to keep the system afloat to suggest that Katrina was *solely* responsible for the systemic collapse of justice in New Orleans. The New Orleans justice system had long-standing, pre-existing systemic deficiencies that were unmasked and accentuated by the catalyst Katrina"). The inevitable procedural changes and motions practice that will result from the Louisiana Supreme Court's affirmative acceptance requirement will severely drain an already limited pool of public defender resources.

Moreover, many judicial districts in Louisiana do not transcribe initial hearings, or, at best, use only clerk minute notes. If the Louisiana Supreme Court's approach is allowed to stand, it will invite extensive motions practice based on off-the-record testimony of court officials, law enforcement personnel, and other witnesses as to whether a defendant in some way signaled acceptance of counsel.

Finally, the affirmative acceptance requirement will place yet another financial burden on already strained public defender resources. In practice, these financial restraints will likely result in defendants losing counsel because this new mandate cannot be addressed in the Louisiana Criminal Courts under the current financing of Louisiana's public defense system.

ARGUMENT

I. THE VARIETY OF PARISH PRACTICES IN LOUISIANA MAKE THE AFFIRMATIVE ACCEPTANCE REQUIREMENT UNWORKABLE.

In Louisiana, a person arrested and detained must be brought in front of a judge within seventy-two hours so that the judge can appoint counsel. La. C. Cr. P. art. 230.1. Under Article 230.1, local parish rules allow a defendant to "appear" in court through alternative means, such as by telephone or video conference. *Id.* Moreover, in cases where the defendant is incapacitated, unconscious, or otherwise physically or mentally unable to appear in court within seventy-two hours, the defendant's presence is waived and the court automatically appoints counsel. *Id.*

In Louisiana, each judicial district is free to set their own practices for compliance with Article 230.1. The requirement of affirmative assent favored by the Louisiana Supreme Court is impractical in the context of the varying district practices. In many districts, defendants are not afforded the opportunity to "accept" counsel. In others, counsel is not present with the defendant during the hearing. In almost all of Louisiana's judicial districts, hearings are not transcribed in any detailed manner. What is clear upon an examination of local practice is that district procedures were not designed to obtain "affirmative acceptance" of counsel at the seventy-two hour hearing, and requiring such acceptance will result in a *de facto* denial of Sixth Amendment rights as recently affirmed in *Rothgery v. Gillespie County, Texas*, 128 S.Ct. 2578 (2008). Examples from three judicial districts, which are set forth below, illustrate this inherit incompatibility.

In Louisiana's Fourth Judicial District, comprising Morehouse and Ouachita Parishes in the northeast part of the State, defendants in jail appear for their "seventy-two hour hearing" initial appearance by video conference.[3] Although a public defender is often present at the courthouse, there is no attorney present alongside the accused at the jails. At the hearing, the judge asks the defendants if they are able to hire a lawyer. If the defendant answers no, the judge refers him/her to an investigator present at the jail, who immediately interviews the defendant to see if he/she qualifies for public defender representation. If the investigator determines that the defendant is indeed indigent, a public defender is assigned to represent the accused. After the investigator's assessment, there is normally no further dialogue between the defendant and the judge until arraignment. Accordingly, there is no opportunity for the defendant, at the time of appointment, to affirmatively accept counsel before the court.

In the neighboring Fifth Judicial District, comprised of West Carroll, Richland, and Franklin parishes, defendants do not appear for their seventy-two hour hearing. Instead, the Sheriff's Office delivers a list of defendants to the judges of the district at various times throughout the day (and sometimes at night). At this initial stage, the judge assumes that any defendant still in jail after seventy-two hours is indigent, appoints an attorney, and telephones the defendant to provide counsel's contact information.[4] These calls are made from the judge's chambers and are not on the record. At the time of appointment, no attorney is present in court, in jail, or in the judge's chambers.

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[3] Defendants in custody can also appear at initial hearings by video in the 3rd, 6th, 8th, 10th, 14th, 15th, 16th, 17th, 22nd, 23rd, 39th and 40th judicial districts.

In Louisiana's Twenty-Fourth Judicial District, coextensive with Jefferson Parish and bordering on New Orleans, defendants are physically brought before a magistrate judge for their seventy-two hour hearing. A public defender designated specifically to handle cases arising from the Magistrate Court is present at this initial appearance. At this hearing, the magistrate judge asks the defendant whether he can afford to hire his own attorney; if he cannot, the judge enters into a colloquy with the defendant to determine whether he is indigent. If the judge determines that the defendant qualifies, he/she will order public defender representation. The initial appearance before the magistrate, however, is a non-record proceeding.

These foregoing examples illustrate that the practices in many of Louisiana's judicial districts will result in a failure of indigent defendants to affirmatively accept counsel and secure their Sixth Amendment rights. In districts like Louisiana's Fifth District, where counsel is appointed to anyone in jail after seventy-two hours, defendants are not asked if they accept counsel. Similarly, in judicial districts like the Fourth District—where the public defender is appointed mechanically after an investigator determines indigency—there are limited opportunities for defendants to then affirmatively accept counsel. Moreover, in districts like the Fourth and Fifth Districts where appointment of counsel is done outside the presence of a lawyer, defendants have no opportunity to confer with appointed counsel to ensure "acceptance."

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[4] Only later, when the defendant appears for his arraignment, does the judge question the defendant in open court as to his financial status and as to whether he wishes to represent himself.

Even the Twenty-Fourth Judicial District's procedures—which are the only procedures of the three districts discussed that includes a personal appearance before a judge and a colloquy on financial considerations—are incompatible with the Louisiana Supreme Court's affirmative acceptance requirement. The Louisiana Supreme Court mandates that the defendant must affirmatively accept court appointed counsel. *Montejo*, 974 So.2d at 1261. Litigation on this issue will inevitably turn, as it did in Mr. Montejo's case, on whether the minute entries sufficiently describe the defendant's reaction to his appointment of counsel. *Id.* at 1260 ("While the minute entry clearly shows that counsel was appointed, it does not show a response by defendant"). In cases like Mr. Montejo's, motions practice will reduce to mere conflicting assertions as to whether the defendant made any type of affirmative response to the appointment of counsel.

These examples make clear that the practical result of an affirmative acceptance requirement will be to deny counsel to many indigent defendants. This Court just recently affirmed that a defendant's Sixth Amendment right to counsel is triggered at seventy-two hour type initial hearings. *See Rothgery*, 128 S.Ct. at 2592 (2008). If the Louisiana Supreme Court's approach is allowed to stand, indigent defendants under many local practices will not "accept" counsel by the mere fact that a chance to accept was never offered. Moreover, even if defendants are given an opportunity to speak to the court after counsel is appointed, an acceptance requirement will result in a trap for the uneducated and mentally infirm, which constitute a large percentage of Louisiana's indigent population. This Court should reject the Louisiana Supreme Court's approach because it is a *de facto* denial of counsel contrary to Sixth Amendments rights as provided in *Rothgery*.

II. THE AFFIRMATIVE ACCEPTANCE REQUIREMENT IN *MONTEJO* WILL ADD UNNECESSARY COSTS TO AN ALREADY STRAINED PUBLIC DEFENDER SYSTEM.

In addition to the incompatibility of Louisiana practice with an affirmative acceptance rule, such a rule would also result in an immense drain on the already limited resources of Louisiana's public defender system. Louisiana's public defender program has neither the personnel nor the capital resources to commit to such hearings.

Already, Louisiana public defenders are heavily burdened by large caseloads and small budgets. In many Louisiana parishes, public defender caseloads far exceed the recommend level set by the National Legal Aid and Defender Association (NLADA). National Legal Aid and Defender Association, *In Defense of Public Access to Justice, An Assessment of Third Level Indigent Defense Services in Louisiana 40 Years after Gideon*, 6 (2004).[5] One report looking at public defender resources in Louisiana before and after Hurricane Katrina commented:

> Pre-Katrina, the public defender system in New Orleans was not obligated to adhere to any national, state or local standards of justice resulting in public defenders handling too many cases, with insufficient support staff, practically no training or supervision, experiencing undue interference from the judiciary, all while compromising their practices by working part-time in private practices to augment their inadequate compensation . . . . In the aftermath of the storm things only got worse.[6]

As an example of the existing restraints, attorneys in Rapides Parish have reported handling up to three times the recommended felony cases, several of them capital defense cases. *Id.* at 37. Under the NLADA guidelines, attorneys should "handle no more than one or two capital cases per year and nothing else." *Id.* With personnel already spread thin, the Louisiana public defender system cannot handle the further strain of appearing before the types of hearings resulting from *Montejo*.

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[5] http://www.lapda.org/Parish%20Report/In_Defense_of_Public_Access_to_Justice.pdf.

[6] National Legal Aid & Defender Association, *A Strategic Plan to Ensure Accountability & Protect Fairness in Louisiana's Criminal Courts* (September 2006) at iv.

Moreover, Louisiana's public defender system does not have the financial resources to conform to an affirmative acceptance rule. Louisiana receives funding for its public defenders from the state government and from court fees, which have not kept up with the increasing demand that is put on public defenders. For instance, while felony rates in Caddo Parish from 1999 through 2002 increased by 16.6%, indigent defense funding fell by 4.2%. NLADA, *In Defense of Public Access to Justice, An Assessment of Third Level Indigent Defense Services in Louisiana 40 Years after Gideon*, 25 (2004). This situation is by no means isolated to Caddo Parish. A report prepared after Hurricane Katrina by the Department of Justice, Bureau of Justice Affairs, noted that while the budgetary needs of the New Orleans public defender system were approximately eight million dollars ($8,000,000), the system received only about one-third of that amount. Nicholas Cbiarkis, D. Alan Henry, & Randolph Stone, *An Assessment of the Immediate and Longer-Term Needs of the New Orleans Public Defender System*, Study of the Bureau of Justice Initiative National Training & Technical Assistance Initiative Project at American University 26 (2006).[7]

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[7] http://www.lajusticecoalition.org/doc/DOJ-Orleans-Parish-Study.pdf.

If an affirmative acceptance requirement is implemented, Louisiana public defenders will need to commit personnel and financial resources that it does not have to *all* initial appointment hearings to ensure that the record clearly demonstrates the defendant's acceptance of counsel. Furthermore, public defenders would need to consult with potential clients during any colloquy with the judge to discuss the need for an affirmative assertion and the implications thereof.

The extraordinary costs of complying with this new regime are multifold. Because many hearings in Louisiana are done by video or telephone, an attorney would have to be present both at the courthouse with the judge and at the jail with the defendant. Further complications arise with respect to non-English speaking defendants, in which case translators would have to be present to translate and explain the proceedings to the defendant on behalf of the public defenders. An affirmative acceptance requirement would demand more public defenders and support staff time, and increase the costs of initial hearings. This would severely and unnecessarily put additional strain on the limited financial and personnel resources of the Louisiana public defenders' offices. [8]

In addition, an affirmative acceptance requirement will inevitably result in costly and time-consuming motions practice to challenge and defend the defendant's acceptance of appointed counsel. The Louisiana Supreme Court vaguely allows "some kind of positive statement or other action" in order to affirmatively accept counsel. *Montejo*, 974 So.2d at 1261. Because many judicial districts do not transcribe these proceedings, any dispute over acceptance of appointed counsel would depend on testimonial evidence from those present at the hearing. In light of the financial strains that already exist on Louisiana public defenders, this procedurally cumbersome practice will be a significant burden on already limited resources.

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[8] In addition to the burden on defense attorneys, the local Louisiana courts—which are also strapped for resources—will be burdened with an unnecessary formality.

CONCLUSION

For the foregoing reasons, the judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

G. Paul Marx, Executive Counsel
Counsel of Record
LOUISIANA PUBLIC DEFENDERS' ASSOC.
PO Box 82394
Lafayette, LA 70598
337-237-2537

Daniel A. Curto
Rahul Rao
MCDERMOTT WILL & EMERY LLP
28 State Street
Boston, MA 02109
617-535-4000

Counsel for the Amici Curiae

November 24, 2008

AMICUS
CURIAE
BRIEF

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(6)

No. 07-1529

Supreme Court, U.S.
FILED
NOV 2 4 2008
OFFICE OF THE CLERK

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA, AND THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW AS AMICI CURIAE IN SUPPORT OF PETITIONER

BARBARA BERGMAN
Co-chair, Amicus Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1117 Stanford, N.E.
Albuquerque, N.M. 87131
(505) 277-3304

JONATHAN L. MARCUS
Counsel of Record
ANNA E. LUMELSKY
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

NOVEMBER 2008

(*additional counsel listed on inside cover*)

BOTH 47BRUK

77698c 36

STEVEN SHAPIRO
ROBIN DAHLBERG
AMERICAN CIVIL LIBERTIES
UNION NATIONAL LEGAL
OFFICE
125 Broad Street
18th Floor
New York, NY 10004
(212) 549-2500

KATIE SCHWARTZMANN
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
LOUISIANA
PO Box 56157
New Orleans, LA 70156
(504) 592-8056

DAVID S. UDELL
MELANCA CLARK
BRENNAN CENTER FOR
JUSTICE AT NYU SCHOOL OF
LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6730

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a membership of more than 12,000 and affiliate memberships of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates. The NACDL files numerous amicus briefs before this Court each year. Recent cases in which the NACDL has filed an amicus brief include *Giles v. California*, 128 S. Ct. 2678 (2008); *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008); *Indiana v. Edwards*, 128 S. Ct. 2379 (2008); and *Schriro v. Landrigan*, 550 U.S. 465 (2007).

The American Civil Liberties Union ("ACLU") is a nonprofit, nonpartisan national organization with over 500,000 members, and the ACLU of Louisiana is one of its state affiliates. The ACLU was founded in 1920, and is dedicated to preserving the principles of liberty and equality embodied in the Constitution and the civil rights laws of this country. The ACLU files numerous amicus briefs before this Court each year. Recent cases in which the ACLU has filed an amicus brief include *Kennedy v. Louisiana,* 128 S. Ct. 2641 (2008); *Virginia v. Moore,* 128 S. Ct. 1598 (2008); *Danforth v. Minnesota,* 128 S. Ct. 1029 (2008); and *Kimbrough v. United States,* 128 S. Ct. 558 (2007).

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[1] Each party has consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

The Brennan Center for Justice at New York University School of Law ("Brennan Center") is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. An important part of the Brennan Center's work is its effort to close the "justice gap" by strengthening public defender services and working to secure the promise of *Gideon v. Wainwright,* 372 U.S. 335 (1963). The Brennan Center's Access to Justice Project works to ensure that low-income individuals, families, and communities in this country are able to obtain effective legal representation. The Brennan Center has filed a number of amicus briefs in cases before this Court, including *Rothgery v. Gillespie County,* 128 S. Ct. 2578 (2008) and *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006).

The members of the NACDL, ACLU, the ACLU of Louisiana, and the Brennan Center are acutely aware of the challenges faced by indigent defendants in the criminal justice system, and have a strong interest in ensuring that such defendants receive the full protections of the Constitution. Each organization believes that this case presents important issues related to the Sixth Amendment right of indigent defendants to be free from police-initiated interrogation without counsel present after counsel has been appointed.

STATEMENT

1. On September 6, 2002, Petitioner Jessie Jay Montejo was taken to the Gretna, Louisiana police station for questioning in connection with a murder investigation. Pet. App. 9a-10a. At the Gretna police station, Petitioner asked for an attorney but was told by the Gretna detectives that they "wouldn't really recommend that." R2779 (Trial Tr. 3/8/2005); Pet. App. 10a n.19. Petitioner was then transferred to a St. Tammany Parish Sheriff's office, where he was questioned from about 4:30 p.m. to 11 p.m. on September 6. *Id.* at 9a. Petitioner was jailed for several hours after this interrogation, and was then transported to a different St. Tammany Parish Sheriff's office, where he was interrogated for an additional hour very early on the morning of September 7. *Id.*; R. 2350 (Trial Tr. 3/6/2005); R. 2706-07, 2730 (Trial Tr. 3/8/2005).

On videotape, Petitioner initially discussed the case with the police, Pet. App. 11a-14a, but then stated that he would "answer no more questions unless" he had a lawyer, *id.* at 14a. The police immediately told Petitioner that he was under arrest for first degree murder, and then began scolding him for asking for a lawyer, which caused him to relent:

> Detective Major: (interrupting) Dude, you don't want to talk to us no more, you want a lawyer, right? I trusted you and you let me down.
> Petitioner: No, come here, come here.
> Detective Major: No, no, I can't.
> Petitioner: No, come here . . .
> Detective Major: No, you've asked for an attorney, and you are getting your charge. And the shame of it is . . .
> Petitioner: I don't want no attorney.

Id. at 15a. The video recorder was turned off at this point. *Id.* When it was turned on ten minutes later, the detectives stated on camera that Petitioner was not interviewed during the untaped interval, that he understood his rights, and that he wanted to continue the interview without counsel present. *Id.* at 15a-16a. Petitioner, however, looked "visibly upset." *Id.* at 16a. Questioning resumed and lasted until about 11 p.m., when Petitioner was jailed. He was then questioned for an additional hour in the early morning of September 7. *Id.* at 9a, 16a-17a.

On September 10, 2002, Petitioner was brought before a judge for a "72-hour hearing," as required by Louisiana law. Pet. App. 42a; La. Code Crim. Proc. Ann. art. 230.1 (2008).[2] No transcript was made. The only record of the hearing states that the

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[2] Article 230.1 of the Louisiana Code of Criminal Procedure provides, in relevant part, that "[t]he sheriff or law enforcement officer having custody of an arrested person shall bring him promptly, and in any case within seventy-two hours from the time of the arrest, before a judge for the purpose of appointment of counsel." La. Code Crim. Proc. Ann. art. 230.1 (A) (2008).

District Attorney, Sheriff, and Clerk of Court attended, and describes the proceedings as follows:

> The defendant being present and this matter came before the Court for Seventy-Two Hour Hearing to determine bond and Counsel. The defendant being charged with First Degree Murder, Court ordered No Bond set in this matter. Further, Court ordered the Office of the Indigent Defender be appointed to represent the defendant.

Pet. App. 63a. Later that same day, police approached Petitioner without his counsel present and asked him to accompany them on a search for the murder weapon. R2582-83 (Trial Tr. 3/7/2005). Petitioner responded that counsel had been appointed to him, as he testified at trial:

> They asked me if I would come with them to go clear up where I threw the gun at. So I said, Well, and I don't, I don't, I don't really want to go with you. He said, Do you have a lawyer? I said, yeah, I got a lawyer appointed to me. He said, No, no, you don't. I said, Yeah, I think I got a lawyer appointed to me, and I guess that's where I messed up, when I said I think I got a lawyer appointed to me. He said, no, you don't. He said, I checked, you don't have a lawyer appointed to you.

Pet. App. 49a.[3] Following this exchange, Petitioner agreed to accompany the detectives. During the car ride, Petitioner used pen and paper provided by the detectives to write a letter of apology to the victim's wife. *Id.* at 20a. Petitioner testified that the idea of the letter was suggested by one of the detectives and that its contents were largely dictated by the other detective. R2790-91 (Trial Tr. 3/8/2005). The detectives were unable to locate the murder weapon, and they eventually returned Petitioner to the St. Tammany jail, where Detective Hall was confronted by Petitioner's appointed counsel. Pet. App. 21a n.46.

Petitioner was indicted on October 24, 2002. Pet. App. 1a. Following a suppression hearing, the trial court held that the September 10 letter was admissible at trial. *Id.* at 21a-22a. A jury found Petitioner guilty of first-degree murder, and he was sentenced to death on May 13, 2005. *Id.* at 69a.

2. The Louisiana Supreme Court affirmed. Pet. App. 42a-51a. As relevant here, it rejected Petitioner's contention that the trial court erred in admitting the letter because he had not validly waived his Sixth Amendment right to counsel before writing the letter. *Id.*

The court noted that, under *Michigan v. Jackson*, 475 U.S. 625 (1986), "once defendant's right to counsel has attached, if he makes an assertion or invocation of this right, any waiver he would later make in response to police-initiated interrogation will be considered invalid." Pet. App. 46a (quoting *State v. Carter*, 664 So. 2d 367, 382 (La. 1995)). The court concluded that the *Jackson* rule did not apply here despite the fact that Petitioner was represented by counsel at the time Detective Hall approached him. *Id.* at 46a-48a. The court pointed to the "minute entry" for the 72-hour hearing, which showed that, "[w]hile . . . counsel was appointed, it does not show a response by defendant." *Id.* at 47a. The court stated that, under its precedent, "something more than the mere mute acquiescence in the appointment of counsel is necessary to show the defendant has asserted his right to counsel to sufficiently trigger" the *Jackson* rule. *Id.* (internal quotation marks and brackets omitted). Because Petitioner did "not allege that he made any statement at th[e] hearing asserting his right to counsel," the court held that Petitioner's Sixth Amendment right to counsel was not protected by the *Jackson* rule. *Id.*

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[3] Detective Jerry Hall, who approached Petitioner about the car ride, testified that he did not know that Petitioner had been appointed counsel at the time, despite the fact that a representative of the Sheriff's Office had attended the 72-hour hearing that morning. Pet. App. 50a, 63a.

The Louisiana Supreme Court next rejected Petitioner's contention that he did not knowingly waive his Sixth Amendment right to counsel. Pet. App. 49a-51a. Assuming that the police misled Petitioner in response to his assertion that he was represented by counsel by telling him incorrectly that he did not have a lawyer, *id.* at 49a & n.69, the court held nonetheless that Petitioner's waiver was knowing and intelligent because the police gave him the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966); Pet. App. 51a.[4]

SUMMARY OF ARGUMENT

In *Michigan v. Jackson*, 475 U.S. 625 (1986), this Court held that, when a defendant requests counsel at an arraignment or similar proceeding, a later waiver of that right during police-initiated interrogation is invalid under the Sixth Amendment. In subsequent cases, this Court made clear that the *Jackson* rule applies "once a defendant obtains or even requests counsel." *Michigan v. Harvey*, 494 U.S. 344, 352 (1990). *See Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988) (observing that, while an unrepresented defendant may be interrogated by police without counsel present after adversarial proceedings have begun, "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect").

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[4] In so holding, the court stated that the facts here did "not rise to the level of the facts presented in *Moran v. Burbine*, [475 U.S. 412 (1986)]" in which "the United States Supreme Court permitted a *Miranda* waiver to stand under the Sixth Amendment where a suspect was not told that his lawyer was trying to reach him during questioning and the lawyer was told by police that the defendant would not be questioned without the lawyer's presence." Pet. App. 49a-50a n.69. The court's description of this Court's holding in *Burbine* is erroneous: *Burbine* held that the Sixth Amendment was inapplicable to the interrogation, which "preceded the formal initiation of adversary judicial proceedings." 475 U.S. at 432. The conduct of the police thus only factored into the Court's analysis of the scope of *Miranda* in protecting the defendant's Fifth Amendment rights.

The Louisiana Supreme Court carved out an exception to the *Jackson* rule, permitting the police to initiate interrogation of a represented defendant without counsel present if the defendant accepted the appointment of counsel silently—that is, without having made a statement or gesture affirming the acceptance. The Louisiana Supreme Court's approach is unfair, unworkable, and illogical. It will also undermine the Sixth Amendment right to counsel at a critical stage of the prosecution. For all of these reasons, the decision should be reversed.

The Louisiana Supreme Court's approach is unfair because different jurisdictions follow different policies and practices in the appointment of counsel, and these policies and practices often determine whether or not a defendant makes an explicit request for counsel on the record. Many states require courts to ask the defendant whether he wants counsel to be appointed for him. Requests for counsel in these states thus are typically prompted by the State and reflect nothing more than compliance with state procedure geared towards determining whether a defendant is indigent and thus needs appointed counsel. Other states do not require courts to question the defendant before appointing counsel. The absence of a request in these states thus reflects nothing more than the absence of a built-in opportunity at the initial hearing for the defendant to provide input. Given the differences in procedure from state to state, jurisdiction to jurisdiction, and courtroom to courtroom, and given that the procedures are designed to facilitate the appointment of counsel to indigent defendants rather than to measure a defendant's desire to proceed *pro se,* it is unfair to use the presence or absence of a request for counsel during the initial hearing as a proxy for a represented defendant's desire to have counsel protect him from police-initiated interrogation. Rather, the fact that the defendant has obtained counsel in itself reflects that desire.

The Louisiana Supreme Court discounted the fact of representation here because Petitioner accepted the court's appointment of counsel silently. But requiring the defendant to make a statement or gesture affirming the acceptance is unfair. There is no indication that Petitioner was given an opportunity to speak in response to the appointment, and there is no reason why Petitioner would have felt any need to assert or reaffirm his right to counsel after the court affirmed that right by appointing him one.

The Louisiana Supreme Court's approach is also unworkable. Conditioning the application of *Jackson* on the nature of the defendant's response to the appointment of counsel invites disputes about what the defendant said or did at his initial hearing. The problem is that the best evidence to resolve such a dispute—a transcript or videotape of the hearing—will often be unavailable, as it was here. The Louisiana Supreme Court's approach will also create difficult line-drawing problems, detracting from the bright-line quality of the *Jackson* rule, because it is unclear what statements or gestures will be deemed sufficient to constitute an affirmation of the acceptance of counsel.

The decision also does not provide clear guidance to the police. First, although the police may often attend initial hearings, in the cases in which they do not, they will not know whether they may initiate interrogation of a represented defendant without counsel present. Second, even in those cases in which the police have attended the hearing, they will have to decide whether a statement or gesture by the defendant sufficiently affirmed his acceptance of counsel before initiating interrogation. The ambiguity inherent in the Louisiana Supreme Court's approach will make that determination difficult.

The Louisiana Supreme Court's approach to *Jackson* not only is unfair and unworkable, but it also is illogical. The Court in *Jackson* held that a defendant who fills out an affidavit for the appointment of counsel presumptively desires representation at every critical stage of the prosecution, including for police-initiated interrogation. There is no logical basis for applying a different presumption to a defendant who is represented by counsel. The Louisiana Supreme Court did not hold that Petitioner waived his right to counsel by remaining silent at the 72-hour hearing, nor could it have so held given the many steps a court and defendant must take to waive the right. Instead, the court held that it could not presume Petitioner's desire for counsel at police-initiated interrogation from his mere "acquiescence" (Pet. App. 47a) in counsel's appointment. In principle, such reasoning could be applied to other critical stages of the prosecution, such as a preliminary hearing or trial, but a presumption against a represented defendant's desire for counsel at these stages is clearly untenable. Yet there is no sound basis for presuming that Petitioner desired counsel for some purposes but not others. To the contrary, a represented defendant, no less than the defendant in *Jackson* who followed the requisite steps to obtain representation, is presumed to desire counsel for all critical stages of the prosecution. This Court confirmed this common sense proposition in *Harvey* and *Patterson,* where it made clear that police cannot initiate interrogation of represented defendants without counsel present. For all of these reasons, the Louisiana Supreme Court's decision to carve out a subset of represented defendants from *Jackson*'s protection should be reversed.

The Louisiana Supreme Court's decision undermines the Sixth Amendment's guarantee of counsel as a "'medium' between [the defendant] and the State." *Maine v. Moulton,* 474 U.S. 159, 176 (1985). As this Court has repeatedly recognized, the defendant "is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings." *Rothgery v. Gillespie County,* 128 S. Ct. 2578, 2591 (2008). Pretrial interrogation is a critical stage. *See id.* at 2594 (Alito, J., concurring) (citing cases). By permitting the police to elicit incriminating statements from indigent defendants in the absence of their counsel, the Louisiana Supreme Court has diluted the protection that the Sixth Amendment right to counsel is designed to afford represented defendants.

The egregious facts of this case starkly demonstrate that point. The police approached Petitioner before his counsel could reach him and induced him to make incriminating statements by falsely informing him—in response to his assertion that he was represented by counsel—that he did not have an attorney. Requiring that a defendant's attorney be present for police-initiated interrogation ensures that the police are unable to eviscerate the Sixth Amendment right to counsel as they did here.

ARGUMENT

I. The Louisiana Supreme Court's Decision To Exclude A Category Of Represented Defendants From The Protection That *Michigan v. Jackson* Provides Against Police-Initiated Interrogation Is Incorrect.

In *Michigan v. Jackson*, 475 U.S. 625 (1986), this Court held that a defendant's waiver of the right to counsel during police-initiated interrogation was invalid where the defendant had previously requested counsel at an arraignment or similar proceeding. *Id.* at 636. In *Michigan v. Harvey*, 494 U.S. 344 (1990), and *Patterson v. Illinois*, 487 U.S. 285 (1988), this Court made clear that the *Jackson* rule applies to any defendant who *has* counsel as well as to a defendant who requests counsel. *See Harvey*, 494 U.S. at 352; *Patterson*, 487 U.S. at 290 n.3. In doing so, the Court recognized that a defendant who is already represented by counsel must be entitled to no less protection against police-initiated interrogation than a defendant who has merely asked the court for counsel. As explained below, the Louisiana Supreme Court's decision to exclude from *Jackson*'s ambit a defendant who silently accepts appointed counsel is unfair, unworkable, and illogical. For all of these reasons, the decision should be reversed.

A. In Light Of Actual State And Local Practices, the Line Drawn By The Louisiana Supreme Court Between Petitioner And Other Represented Defendants Is Unfair.

Policies and practices governing the provision of counsel to indigent defendants vary greatly both by state and within states. Certain jurisdictions require a judge to ask defendants whether they request counsel before appointing counsel, while others do not. Beyond the written rules, moreover, judges often have significant freedom to devise their own procedures for appointment of counsel, and practices can differ even between two judges in the same courthouse. In light of the lack of uniformity, a defendant's request for the appointment of counsel at a hearing or the absence of such a request is often indicative of nothing more than the particular rules and practices of the court in which the defendant appeared.

Some jurisdictions provide an affirmative opportunity for the defendant to express a desire for the appointment of counsel. In California, for example, the Penal Code provides that when a defendant is charged with a felony, the magistrate shall "*ask the defendant* if he or she desires the assistance of counsel . . . If the defendant desires and is unable to employ counsel, the court shall assign counsel to defend him or her." Cal. Penal Code § 859 (2008) (emphasis added). Similarly, Montana requires that "[d]uring the initial appearance before the court, every defendant must be informed of the right to have counsel and *must be asked* if the aid of counsel is desired." Mont. Code Ann. § 46-8-101 (2007) (emphasis added). In these states, most defendants presumably make a request for counsel on the record, simply because they are prompted by the court.

By contrast, many jurisdictions appoint counsel without asking the defendant any questions. In Utah, for example, the relevant statute provides that a judge should appoint counsel either if "the indigent requests counsel" *or* if "the court on its own motion or otherwise orders counsel, . . . and the defendant does not affirmatively waive or reject on the record the opportunity to be represented." Utah Code Ann. § 77-32-302 (2008). Similarly, the relevant Idaho provision makes no reference to a request by the accused: "If a court determines that the person is entitled to be represented by an attorney at public expense, it shall promptly notify the public defender or assign an attorney, as the case may be." Idaho Code Ann. § 19-853(c) (2008). Without a procedural opportunity to speak in jurisdictions like these, it would be surprising for the defendant to make spontaneous comments regarding counsel. Because a difference in state or local procedures rather than a difference in the relative desire for counsel will typically explain the presence or absence of a request for counsel at an initial hearing, the Louisiana Supreme Court's approach—which uses the request as a proxy for the desire to have counsel— is unjust.[5]

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[5] The fact that some jurisdictions call for the court to ask whether the defendant requests counsel does not mean that (...continued)

The facts in *Michigan v. Jackson* demonstrate how local practice can determine whether the defendant requests counsel at a hearing. In *Jackson,* this Court determined that "[d]uring the arraignment, [the defendant] requested that counsel be appointed for him." 475 U.S. at 628. The transcript of that arraignment, in pertinent part, reads as follows:

> THE COURT: The Court will enter a plea of not guilty. In the case of the people versus Robert Bernard Jackson, and Michael White, and Charles Knight, you have each filled out an affidavit for appointment of counsel. Will each of you raise your right hand. Do you swear or affirm that the statements made in these affidavits for appointment of counsel are all true?
>
> (Defendants responded.)

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these jurisdictions will treat the absence of a request for counsel as a waiver. For example, under Florida law, a defendant is given the opportunity to request counsel, but the absence of a request standing alone will not prevent the appointment of counsel. *See* Fla. R. Crim. Proc. 3.111(b)(5) (2008) ("Before appointing a public defender the court shall . . . (B) make inquiry into the financial status of the accused . . . . The accused shall respond to the inquiry under oath.) ; *Id.* § 3.111(d)(1) ("The failure of a defendant to request appointment of counsel . . . shall not, in itself, constitute a waiver of counsel at any stage of the proceedings."). Indeed, the Constitution prohibits states from conditioning the appointment of counsel on a request. *See Carnley v. Cochran,* 369 U.S. 506, 513 (1962) ("[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.").

> THE COURT: You each indicate yes. The Court will recommend appointment of counsel in each case.

Michigan v. Jackson, Supreme Court Joint App. 133-34. Thus, the defendant's request to the court in *Jackson* was merely an affirmation that statements in an affidavit (presumably attesting to indigency) were accurate.

The defendant in *Jackson* was simply following state procedures and the court's instructions in seeking to obtain counsel. Because Petitioner did all that was necessary in his jurisdiction to obtain counsel, there is no valid basis for distinguishing him from the defendant in *Jackson* for the purpose of determining the scope of Sixth Amendment protection. Indeed, the Louisiana Supreme Court's approach penalizes Petitioner for the mere happenstance of being prosecuted in a jurisdiction that permits the court to appoint counsel without input from the defendant based on a preliminary determination of indigency.[6]

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[6] To the extent that the *Jackson* defendant's submission of an affidavit for appointment of counsel in itself constituted the relevant request for counsel, the distinction that the Louisiana Supreme Court tried to make would be subject to the same flaws. Because appointment of counsel generally requires a determination of indigency, many states and localities require the defendant to submit some type of financial affidavit for the provision of appointed counsel. Some jurisdictions follow this submission with an inquiry on the record, as in *Jackson*, while others do not. Both the indigency forms themselves and the procedures governing them differ by jurisdiction. *See, e.g.*, Ohio Financial Disclosure/Affidavit of Indigency Form and instructions, <http://www.lcmunicipalcourt.com/UserUploads/U

(...continued)

What these differences in state and local procedure highlight is that the process of appointing counsel for indigent defendants is geared not to gauging whether a defendant wants representation or to proceed *pro se*, but rather whether a defendant cannot afford to retain an attorney. Thus, how an indigent defendant complies with this process in obtaining appointed counsel is not a meaningful indicator of whether the defendant desires the assistance of counsel at police-initiated interrogation. To the contrary, the fact that the defendant has obtained counsel in itself reflects that desire.

The Louisiana Supreme Court discounted the fact that petitioner had been appointed counsel because he did not "respon[d]" to the appointment with a statement or gesture. Pet. App. 47a. But it was

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serDocuments/FinancialDisclosureForm_AffidavitofIndigency.pdf>; Shelby County, Tennessee Criminal Court Uniform Affidavit of Indigency, <http://co4.shelbycountytn.gov/court_clerks/criminal_court/FORMS/UnifAffidavitIndig%20CC7-87(a-b).pdf>; State of Wisconsin Petition for Appointment of Counsel, Affidavit of Indigency and Order, <http://www.wicourts.gov/formdisplay/GF-152.pdf?formNumber=GF-152&formType=Form&formatId=2&language=en>.

Moreover, some judges conduct an oral screening for indigency; a defendant's responses to such screening questions arguably may suggest an assertion of the right to counsel, but procedural variation among jurisdictions would make a rule that turns on the assertion of the right to counsel impossible to apply. *See* Brennan Center for Justice, The Access to Justice Program, *Eligible for Justice: Guidelines for Appointing Defense Counsel* (2008), <http://www.brennancenter.org/content/resource/eligible_for_justice/>, at 7-8 (reporting that certain states have uniform indigency screening criteria and procedures while others do not, and that some counties do not screen for indigency at all).

unfair for the court to measure Petitioner's desire for counsel by whether he accepted the appointment silently or in animated fashion. The record does not reflect whether Petitioner was given an opportunity to speak upon being appointed counsel. Moreover, even if there had been such an opportunity, a reasonable person in Petitioner's shoes would not have had any reason to "assert his right to counsel" (*id.*) upon hearing the court appoint him counsel and thereby affirm his right to counsel. The line the court drew between Petitioner and other represented defendants for purposes of receiving the protection of counsel at police-initiated interrogation therefore is unfair.

B. The Louisiana Supreme Court's Approach Would Render The Bright-Line *Jackson* Rule Unworkable And Would Not Provide Adequate Guidance To The Police.

The Louisiana Supreme Court's decision also is unworkable. Instead of applying *Jackson* to all represented defendants, the Louisiana Supreme Court requires courts to determine whether a represented defendant made a request for counsel prior to appointment or "respond[ed]" to such an appointment in some manner. Pet. App. 47a. That inquiry will invite factual disputes that will be difficult to resolve because the best evidence of what the defendant said or did—a transcript or videotape—is unlikely to be available. Where, as in this case, the relevant hearing was not transcribed, the court would have to rely on the possibly conflicting memories of hearing attendees to resolve the dispute.

Such an uncertain inquiry would also require difficult line-drawing. The Louisiana Supreme Court faulted Petitioner for making no "response" to the appointment of counsel, but it did not indicate what response would have sufficed to trigger *Jackson*'s protection. The Fifth Circuit's decision in *Montoya v. Collins*, 955 F.2d 279 (5th Cir. 1992), on which the Louisiana Supreme Court relied (*see* Pet. App. 47a n.68), similarly held that *Jackson* did not protect a defendant who was "silen[t]" when the court appointed counsel, but the court did not specify what statement or gesture would have been sufficient. *See Montoya*, 955 F.2d at 282-83 (while a defendant who has been appointed counsel need not state "I want a lawyer" to trigger *Jackson*'s protection, he must make "an actual, positive statement or affirmation of the right to counsel"). Perhaps the statement "Thank you, your honor" or "I appreciate it" would have been sufficient; perhaps not. In any event, it is untenable to have a represented defendant's right to avoid police-initiated interrogation without counsel present turn on whether the defendant merely "acquiesce[d]" (Pet. App. 47a) in the appointment of counsel or accepted counsel's services in a vocal or animated manner.

The Louisiana Supreme Court's decision also fails to provide adequate guidance to the police. If the police do not attend the initial hearing at which counsel is appointed, they will not know whether the defendant "respon[ded]" (Pet. App. 47a) to the appointment of counsel. And even when they do attend the hearing, they still must determine whether the defendant's statements or gestures were sufficient to satisfy the Louisiana Supreme Court's ambiguous standard. In either scenario, the police will not have the guidance necessary to conduct their investigation in a constitutional manner.

Applying *Jackson* to all represented defendants would avoid the problems inherent in the Louisiana Supreme Court's approach and preserve *Jackson*'s bright-line nature. *See Jackson*, 475 U.S. at 634. Such a rule requires no line-drawing: After adversarial proceedings have commenced, police officers may not initiate questioning of a represented defendant outside the presence of counsel.

The Louisiana Supreme Court's approach sacrifices *Jackson*'s bright-line quality for an empty formalism, as this case illustrates so poignantly. Petitioner invoked his right to counsel during every significant encounter with the police, only to be deterred by the police from actually exercising it. He asked for counsel at the Gretna Police station, but was told by the police that "they would not recommend that." Pet. App. 10a n.19. He asserted the right to counsel again during his prolonged interrogation at the St. Tammany Sheriff's Office, prompting the police to announce that he was under arrest for first degree murder and had let them down. *Id.* at 14a-15a. And he invoked counsel once again—this time after his Sixth Amendment rights had attached and counsel had been appointed—when the police came to request that he show them where he disposed of the evidence, and was falsely told in response that he did not have a lawyer. *Id.* at

49a.[7] Yet, the Louisiana Supreme Court held that Petitioner did not "assert his right to counsel" for purposes of *Jackson* because he remained silent when the court appointed him counsel. Pet. App. 47a. The court thus penalized Petitioner for not asserting his right to counsel during the one proceeding where no such assertion was necessary to protect him from any adverse consequences of which he could reasonably have been aware.

Last term, this Court rejected a rule that Sixth Amendment protections do not attach at an initial appearance following a charge unless prosecutors are involved. *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008). The Court rejected such a rule in part because the rule in practice "would be wholly unworkable and impossible to administer" and rest on "absurd distinctions," *id.* at 2588. The Louisiana Supreme Court's approach to *Jackson* suffers from the same flaws. The decision should accordingly be reversed.

C. The Louisiana Supreme Court's Decision Is Illogical.

In *Jackson*, the State argued that a defendant's request for counsel at a court hearing did not constitute the expression of a desire for counsel to be present at a police-initiated interrogation. *Id.* at 632-33. This Court's response to that argument, as it explained in *McNeil v. Wisconsin*, 501 U.S. 171 (1991),

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[7] Although detective Hall testified that he was unaware Petitioner had been appointed counsel, the law deems him to have had knowledge of that fact. As this Court explained in *Jackson*, "Sixth Amendment principles require that we impute the State's knowledge from one state actor to another." 475 U.S. at 634.

> was not that [the defendant's request for counsel] *did* constitute such an expression [of a wish for counsel at a custodial interrogation], but that it *did not have to*, since the relevant question was not whether the *Miranda* 'Fifth Amendment' right had been *asserted*, but whether the Sixth Amendment right to counsel had been *waived*. We said that since our 'settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel, . . . we *presume* that the defendant requests the lawyer's services at every critical stage of the prosecution.' [*Jackson*,] 475 U.S. at 633 (emphasis added).

Id. at 179. The *Jackson* Court thus held that, where a defendant has requested counsel at a hearing (by affirming the truth of statements contained in an affidavit seeking appointment of counsel), that defendant is presumed to desire counsel's assistance at every critical stage of the prosecution, including police-initiated interrogation.

Contrary to the Louisiana Supreme Court's decision, there is no sound basis for not applying the same presumption to a defendant such as Petitioner who has been appointed counsel. The court did not hold that Petitioner had waived the right to counsel by remaining silent at the 72-hour hearing, nor could it have so held. *See Carnley v. Cochran*, 369 U.S.

506, 516 (1962) ("Presuming waiver [of the right to counsel] from a silent record is impermissible."); *Faretta v. California,* 422 U.S. 806, 835 (1975) (A court may accept waiver of the right to counsel only where the defendant is "made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.") (internal quotation marks omitted).[8] Instead, the court held that it could not presume that Petitioner desired counsel at police-initiated interrogation because he accepted the appointment of counsel silently. Identical reasoning could be applied to other critical stages of the prosecution, such as a preliminary hearing or trial, but a presumption against a represented defendant's desire for counsel at these stages is clearly untenable. Yet there is no logical basis for presuming from Petitioner's silence that he desired counsel's assistance for some critical purposes and not others.[9]

---

[8] Consistent with this principle, a number of states presume that defendants desire counsel unless they explicitly state that they do not. *See, e.g.*, Ark. R. Crim. Proc. 8.2(b) (2008) ("Whenever an indigent is charged with a criminal offense and, upon being brought before any court, does not knowingly and intelligently waive the appointment of counsel, the court shall appoint counsel to represent the indigent."); Idaho Crim. Rule 44 (2008) ("Every defendant, who according to law is entitled to appointed counsel, shall have counsel assigned to represent the defendant . . . unless the defendant waives such appointment.").

[9] As we explained above, p. 19, the most plausible inferences to be drawn from Petitioner's silent acceptance of counsel are that either (1) he did not have an opportunity to speak, or (2) he found it unnecessary to assert a right to counsel in the immediate wake of the court's appointment of counsel.

To the contrary, it is logical to presume that all represented defendants, no less than the defendant in *Jackson* who followed the procedures required to obtain appointed counsel, desire counsel's help for all critical stages of the prosecution. This Court has recognized the force of that logic, stating that *Jackson* applies to prevent police-initiated interrogation "once a defendant obtains or even requests counsel." *Harvey*, 494 U.S. at 352. *See also Patterson*, 487 U.S. at 290 n.3 (whereas the police may not initiate interrogation of a defendant who has "not retained, or accepted by appointment, a lawyer to represent him," "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect"). The Louisiana Supreme Court's decision excluding a category of indigent, represented defendants from *Jackson*'s reach should be reversed.

II. Once Adversarial Proceedings Have Commenced, The Sixth Amendment Prohibits Police-Initiated Interrogation Of All Represented Defendants In The Absence Of Counsel.

This Court has recognized that "[t]he Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." *Maine v. Moulton*, 474 U.S. 159, 176 (1985). *See McNeil*, 501 U.S. at 177 ("The purpose of the Sixth Amendment counsel guarantee . . . is to 'protect the unaided layman at critical confrontations' with his 'expert adversary,' the government.") (quoting *United*

States v. Gouveia, 467 U.S. 180, 189 (1984)); *Moran v. Burbine,* 475 U.S. 412, 428 (1986) ("[W]e readily agree that once the [Sixth Amendment] right has attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a 'medium between [the suspect] and the State' during . . . interrogation.") (citation omitted); *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963) (under the Sixth Amendment, a person charged with a crime need not "face his accusers without a lawyer to assist him").

This guarantee is based on a recognition that, once the adversarial process has commenced, the right to counsel "safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding." *Moulton*, 474 U.S. at 169; *see id.* at 170. Given the complexity of pretrial proceedings and their importance to the defendant's fate, "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." *Id.* at 170. As Justice Alito recently observed, "certain pretrial events may so prejudice the outcome of the defendant's prosecution that, as a practical matter, the defendant must be represented at those events in order to enjoy genuinely effective assistance at trial." *Rothgery*, 128 S. Ct. at 2594 (Alito, J., concurring). These events are known as "critical stages" of the prosecution, and it is well settled that "pretrial interrogation" is a critical stage. *See id.* at 2594; *Jackson*, 475 U.S. at 638. As explained below, the Louisiana Supreme Court's decision "dilutes the protection afforded by the right to counsel" (*Moulton*, 474 U.S. at 171) by permitting the police to initiate interrogation of indigent defendants represented by counsel without counsel present, after adversary proceedings have commenced.

In a series of cases involving the deliberate elicitation of incriminating statements from represented defendants who were unaware they were speaking to the government, this Court held that the government's conduct violated the defendants' Sixth Amendment right to counsel. *See Moulton*, 474 U.S. at 176 (The Sixth Amendment right to counsel is violated "when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and the state agent."); *United States v. Henry*, 447 U.S. 264, 274 (1980) ("By intentionally creating a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel, the Government violated [his] Sixth Amendment right to counsel."); *Massiah v. United States*, 377 U.S. 201, 206 (1964) (The use at trial of statements "deliberately elicited from [the defendant] after he had been indicted and in the absence of counsel" violated the Sixth Amendment.). The principle announced in this line of cases—that the police may not circumvent a represented defendant's Sixth Amendment right to counsel by deliberately eliciting statements from the defendant without counsel present—is rooted in the relationship between a represented defendant and his or her attorney following the initiation of adversary proceedings and the recognition of the critical role the attorney plays in protecting the defendant's interests.

This Court has recognized that overt police-initiated interrogation of a defendant who has previously requested or obtained counsel poses a threat to the Sixth Amendment right to counsel no less serious than that posed by covert interrogation. Thus, the Court has made clear in *Harvey, Patterson*, and *Jackson* that a waiver by such a defendant of the right to counsel in response to police-initiated interrogation without counsel present after adversarial proceedings have begun is invalid.

By holding that a category of represented defendants can validly waive their Sixth Amendment right to counsel in response to police-initiated interrogation without counsel present, the Louisiana Supreme Court contravened this Court's long line of cases prohibiting the deliberate elicitation of incriminating statements from a represented defendant without counsel present. The Louisiana Supreme Court's decision permits the police to circumvent counsel's vital role in protecting the defendant against the State during a critical stage of the prosecution.

The facts of this case pointedly illustrate how the decision below will encourage police officers to interfere in blatant fashion with counsel's role "as a 'medium' between [the defendant] and the State." *Moulton*, 474 U.S. at 176. The officers here approached Petitioner hoping to obtain incriminating admissions in the absence of counsel and succeeded in doing so by telling Petitioner falsely that he was wrong in asserting that counsel had been appointed for him. Pet. App. 49a & n.69; *see* note 7, *supra.*[10] Through that deception, the officers removed counsel as a medium between Petitioner and the State. The Sixth Amendment does not tolerate such conduct nor a rule that encourages it.

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[10] If this Court were to agree with the Louisiana Supreme Court that a represented defendant must affirm the appointment of counsel by a statement or gesture to trigger *Jackson*, Petitioner's repeated assertion that "I got a lawyer appointed to me" (Pet. App. 49a) undoubtedly should have sufficed.

CONCLUSION

The judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

BARBARA BERGMAN
Co-chair, Amicus Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1117 Stanford, N.E.
Albuquerque, N.M. 87131
(505) 277-3304

JONATHAN L. MARCUS
Counsel of Record
ANNA E. LUMELSKY
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

STEVEN SHAPIRO
ROBIN DAHLBERG
AMERICAN CIVIL LIBERTIES
UNION NATIONAL LEGAL
OFFICE
125 Broad Street
18th Floor
New York, NY 10004
(212) 549-2500

DAVID S. UDELL
MELANCA CLARK
BRENNAN CENTER FOR
JUSTICE AT NYU SCHOOL OF
LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6730

KATIE SCHWARTZMANN
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
LOUISIANA
PO Box 56157
New Orleans, LA 70156
(504) 592-8056

NOVEMBER 2008

Counsel for Amici Curiae

AMICUS
CURIAE
BRIEF

⑧

No. 07-1529

Supreme Court, U.S.
FILED
NOV 24 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JESSE JAY MONTEJO,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

**On Writ of Certiorari to the
Louisiana Supreme Court**

BRIEF OF *AMICI CURIAE* THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION AND THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITIONER

JO-ANN WALLACE
NATIONAL LEGAL AID &
DEFENDER ASSOCIATION
1140 Connecticut Avenue, NW
Suite 900
Washington, DC 20036
(202) 452-0620

CATHARINE F. EASTERLY
Counsel of Record
SANDRA K. LEVICK
RASHIDA J. OGLETREE
NINA W. CHERNOFF
PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF
COLUMBIA
633 Indiana Avenue, NW
Washington, DC 20004
(202) 628-1200

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICI CURIAE*

The National Legal Aid and Defender Association is the nation's oldest and largest nonprofit association of equal justice professionals. Its membership is comprised of approximately 3,000 offices that provide legal services to poor people, including the majority of public defender offices, coordinated assigned counsel systems, and legal services agencies around the nation. The Public Defender Service for the District of Columbia provides and promotes quality legal representation to indigent adults and children facing a loss of liberty in the District of Columbia.[1]

In *Patterson v. Illinois*, 487 U.S. 285 (1988), this Court observed that "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." *Id.* at 290 n.3. The question in this case is whether, as one might reasonably expect and as is currently the case in every state save Louisiana and Mississippi, indigent defendants have a lawyer immediately upon court-ordered appointment, or whether they must take another step to secure this right—specifically, whether they must interject post-court-appointment unprompted that they accept that which they have already been given. This issue is of obvious concern to *amici*; all of our clients are indigent and are beholden to the State to provide them with counsel, and, until now, we have understood court-ordered appointment to trigger our constitutional and ethical obligations to provide effective assistance to our clients.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici's* intention to file this brief. No counsel for any party authored any part of this brief, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

Based on our knowledge of how the court-appointment system operates, how initial appearances are conducted, and the needs of our clients, *amici* believe the approach endorsed by the Louisiana Supreme Court would place illogical, unfair, and ultimately unworkable burdens on indigent defendants' right to Sixth Amendment protections. Accordingly, we urge the Court not to upset the equitable status quo that favors broad, presumptive court-appointed representation of indigent defendants and to reject Louisiana's post-court-ordered-appointment-unprompted-acceptance approach.

STATEMENT OF THE CASE

Amici adopt Petitioner's statement of the case.

SUMMARY OF ARGUMENT

The Louisiana Supreme Court's approach, requiring a defendant to interject unprompted his acceptance of court-ordered appointment of counsel, challenges the established principle and current practice of broadly and presumptively affording indigent defendants representation. In contrast to Louisiana's approach which impedes representation, this Court and the vast majority of jurisdictions encourage representation of indigent defendants, recognizing that representation by counsel is beneficial to indigent defendants and the criminal justice system as a whole, both in terms of fairness and efficiency. To that end, every state save Louisiana and Mississippi has court-appointment machinery that, although varying in detail, promotes representation of indigent defendants, and places the burden on courts, not indigent defendants, to ensure that defendants are represented absent a valid waiver. Preserving this equitable status quo is reason alone for this Court to reject Louisiana's post-court-ordered-appointment-unprompted-acceptance approach.

But even if this Court were to decide that change is needed and that it is necessary to determine, outside the well-established context of waiver, whether a defendant desires court-appointed counsel, this Court should still reject Louisiana's approach because it fails to meaningfully elucidate whether an indigent defendant who has received court-appointed counsel actually wants a lawyer.

An indigent defendant, although desirous of representation by court-appointed counsel, is unlikely to interject unprompted that he accepts court-appointed counsel because it makes no sense to accept a self-effectuating court order; indigent defendants are unlikely to be aware of such a formalistic requirement; and indigent defendants may well be chilled from speaking out either by the chaotic atmosphere of initial appearances or by the court's instructions. Louisiana's approach is additionally unworkable because it would force judges in many cases to draw conclusions about a defendant's desire for counsel on the basis of incomplete and imprecise records. At initial appearances when counsel is appointed, the primary focus of already overburdened courts is processing crowded criminal dockets as efficiently as possible—leaving little opportunity for interaction with individual defendants, much less a separate colloquy addressing whether a defendant has "accepted" court-ordered appointed counsel—and these proceedings often are not transcribed or recorded.

In short, rather than ensuring that Sixth Amendment protections only extend to those indigent defendants who desire them, Louisiana's post-court-ordered-appointment-unprompted-acceptance approach specifically thwarts representation of indigent defendants by subjecting them to illogical, unfair, and ultimately unworkable demands. This Court should reject the approach of the Louisiana Supreme Court and reverse the decision below.

ARGUMENT

I. LOUISIANA'S APPROACH REQUIRING A DEFENDANT TO INTERJECT UNPROMPTED HIS ACCEPTANCE OF COURT-ORDERED APPOINTMENT OF COUNSEL IGNORES THE REALITY OF WHY AND HOW COURTS APPOINT COUNSEL TO INDIGENT DEFENDANTS.

A litany of this Court's decisions make clear that representation of indigent defendants is beneficial to defendants and the criminal justice system as a whole. Putting that principle into practice, the vast majority of states have set up court-appointment machinery that facilitates broad and presumptive representation of indigent defendants. Endorsement of the Louisiana Supreme Court's approach for determining when an indigent defendant may lay claim to Sixth Amendment protections[2]—which requires an indigent defendant to interject unprompted his acceptance of court-ordered appointment—would upset this equitable status quo and inject uncertainty and confusion into this area of the law. Accordingly, this Court should reject Louisiana's approach.

---

[2] In articulating this approach, the Supreme Court of Louisiana discussed the specific protection of the prophylactic rule of *Michigan v. Jackson*, 475 U.S. 625 (1986), but its reasoning cannot be limited to that context given its focus on the failure to interject acceptance of counsel generally, not the failure to accept counsel specifically as a medium between the defendant and the State in the course of interrogation. *Cf. id. at* 633 (presuming that a defendant who asks for court-appointed

A. Our criminal justice system favors representation by counsel and facilitates representation of indigent defendants by court-appointment.

Louisiana's approach impedes representation by counsel both by requiring indigent defendants post-court-appointment to take an additional step of reassuring courts that they in fact want court-appointed counsel, and by interpreting a defendant's failure to interject "acceptance" of court-appointment as a rejection of the right to counsel. In contrast, recognizing the benefits of representation by counsel in terms of fairness and efficiency, our criminal justice system favors and facilitates representation of indigent defendants and prohibits waivers of the right to counsel by silence.

The reality in our adversarial system of criminal justice is that "lawyers . . . are necessities, not luxuries." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). We recognize that "[e]ven the intelligent and educated layman"—who may be ignorant of his rights, unfamiliar with procedural rules, and no match for the organized forces of the state seeking to prosecute and convict him—"requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 69 (1932); *see also United States v. Ash*, 413 U.S. 300,

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counsel requests an attorney for all purposes in connection with his criminal case).

307 (1973) ("The function of counsel as a guide through complex legal technicalities long has been recognized by this Court."); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) ("The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights . . . .").

These concerns apply with equal if not greater force to indigent defendants. Indigent defendants make up the bulk of the nation's prison population and, as a group, are poorly educated and have high levels of "learning disabilities, and mental impairments." *Halbert v. Michigan*, 545 U.S. 605, 621 (2005) (citing Allen J. Beck & Laura M. Maruschak, U.S. Dept. of Justice, Bureau of Justice Statistics, *Mental Health Treatment in State Prisons, 2000*, 3-4 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtsp00.pdf). They are thus "particularly handicapped as self-representatives." *Id.* at 620. Indeed, data from 2005 shows that "more than half of all prison and jail inmates had a mental health problem." Doris J. James & Lauren E. Glaze, U.S. Dept. of Justice, Bureau of Justice Statistics, *Mental Health Problems of Prison and Jail Inmates*, 1 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf. Indigent defendants, like state inmates, often also have low basic skill levels. For example, "[s]even out of ten inmates fall in the lowest two out of five levels of literacy-marked by an inability to do such basic tasks as . . . use a bus schedule . . . ." *Halbert*, 545 U.S. at 621 (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 140 (2004) (Ginsburg, J., dissenting)) (modifications omitted).

It is precisely because the lay defendant is unfamiliar with, if not ignorant of, our rules and procedures that *pro se* representation is actively discouraged. Self-representation is "inimical to well-functioning trials as well as hazardous to defendants' chances of success." *United States v. Hill*, 252 F.3d 919, 924-25 (7th Cir. 2001); *see also Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 161 (2000) ("No one . . . attempts to argue that as a rule *pro se* representation is wise, desirable, or efficient . . . . Our experience has taught us that a *pro se* defense is usually a bad defense . . . .") (citation and quotation marks omitted). Accordingly, a jurisprudence has grown "demanding more and more extensive advice and warnings to impress on the defendant the drawbacks of dispensing with counsel. This litany is a means of discouraging self-representation . . . ." *Hill*, 252 F.3d at 924 (citations omitted).

Trial courts have an obligation to appoint counsel when they deem the assistance of counsel "a necessary requisite of due process of law." *Powell*, 287 U.S. at 71; *see also Tomkins v. State of Missouri*, 323 U.S. 485, 487 (1945) (Under the *Powell* test, "a request for counsel is not necessary. One must be assigned to the accused if he is unable to employ one and is incapable adequately of making his defense.") (footnote omitted); *Johnson v. Zerbst*, 304 U.S. at 465 ("The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court . . . ."). Moreover, trial courts cannot permit "an accused's ignorant failure to claim his rights" under the Sixth Amendment to result in the "remov[al of] the protection of the Constitution." *Johnson v. Zerbst*, 304 U.S. at 465.

Trial courts have the additional responsibility of ensuring that defendants only proceed *pro se* if they have waived their right to counsel "knowingly and intelligently," *Faretta v. California*, 422 U.S. 806, 835

(1975); *see also Johnson v. Zerbst*, 304 U.S. at 465 (prohibiting waiver based on an "ignorant failure to claim" Sixth Amendment protection), and "[p]resuming waiver from a silent record is impermissible." *Carnley v. Cochran*, 369 U.S. 506, 516 (1962). Instead, a trial court must ensure that the defendant is "aware of the dangers and disadvantages of self-representation" prior to accepting any waiver, *Faretta*, 422 U.S. at 835, and must "'indulge every reasonable presumption against waiver.'" *Michigan v. Jackson*, 475 U.S. 625, 633 (1986) (quoting *Johnson v. Zerbst*, 304 U.S. at 464); *see also Patterson*, 487 U.S. at 298 ("[R]ecognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial."). An approach that would allow a defendant to proceed without counsel at this stage of the proceedings on the basis of silence conflicts with these strict constraints on the waiver process and the principle that "representation by counsel . . . is the standard, not the exception." *Martinez*, 528 U.S. at 161.

B. The vast majority of states have court-appointment machinery that broadly and presumptively affords counsel to indigent defendants.

To ensure that representation is the standard, most states have established an appointment process which broadly and presumptively affords counsel to indigent defendants and places the onus on the courts, not indigent defendants, to ensure the defendants are represented absent a valid waiver.[3] Indeed, in many jurisdictions, counsel is appointed simply upon some showing of indigency made in response to an inquiry by the court or its agents.

The process in the District of Columbia is illustrative. Before the initial appearance, eligibility examiners from the Court Services Office interview defendants to make a determination of indigency. All defendants are interviewed unless they indicate that they have already retained counsel. For each defendant, an eligibility examiner fills out a form detailing the defendant's financial status which the defendant then signs. The form seeks only financial information; it does not include any questions about the defendant's desire for court-appointed counsel. If the defendant is deemed financially eligible, an attorney from the Public Defender Service or a Criminal Justice Act panel attorney is appointed to represent the defendant.[4] The appointed attorney reviews the file and meets with the defendant prior to the initial appearance. Once in court, the defendant's case is called by the judge, the defendant states his name, and then the appointed attorney speaks on behalf of the defendant. This process occurs without any colloquy by the judge to determine whether or not the defendant has accepted appointment—acceptance is assumed.

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[3] Apart from Louisiana, Mississippi is the only other state that, also pursuant to a state Supreme Court decision, departs from this norm and requires a defendant to affirmatively accept appointment of counsel. *See Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997).

[4] A Criminal Justice Act panel attorney is a private attorney "selected from panels of attorneys designated and approved by the courts." D.C. CODE § 11-2601.

There are any number of variations in the state laws and rules governing court-appointment of counsel, but the District of Columbia's procedure is typical of many jurisdictions in that the defendant is not responsible for setting the machinery of court-appointment in motion. *See* D.C. CODE § 11-2602. Rather, with the sole purpose of facilitating appointment of counsel, courts or their agents take the initiative by making inquiries about the defendant's financial status. *See* Appendix of State Statutes and Rules Governing Provision of Counsel to Indigent Defendants (hereinafter "Appendix"); *see, e.g.*, ALA. CODE § 15-12-5(a); ARK. R. CRIM. P. 8.2(a); CONN. GEN. STAT. ANN. § 37-1; FLA. R. CRIM. P. 3.111(b)(5)(B); GA. CODE ANN. § 17-12-24(a); IND. CODE ANN. § 35-33-7-6(a); ME. R. CRIM. P. 44(b); MASS. R. CRIM. P. 7(a)(1); OHIO R. CRIM. P. 44(D); VA. CODE ANN. § 19.2-159(C).

The District of Columbia is also representative in that a determination of indigency automatically triggers court-appointment without any further inquiry of the defendant, unless the defendant takes the initiative to explicitly waive his right to counsel. *See* Appendix; *see, e.g.*, ALASKA STAT. §18.85.100(b) ("at the time the court determines indigency" "the attorney services and facilities and the court costs shall be provided at public expense"); ARK. R. CRIM. P. 8.2(b) ("Whenever an indigent . . . does not knowingly and intelligently waive the appointment of counsel, the court shall appoint counsel to represent the indigent . . . ."); D.C. CODE § 11-2602 ("Unless the defendant . . . waives representation by counsel, the court, if satisfied after appropriate inquiry that the defendant . . . is financially unable to obtain counsel, shall appoint counsel to represent that person."); FLA. R. CRIM. P. 3.111(a) (An indigent person charged with a qualifying offense "shall have counsel appointed . . . ."); IDAHO CODE ANN. § 19-853(c) ("If a court determines that the person is entitled to be represented by an attorney at public expense, it shall promptly notify the public defender or assign an attorney. . . ."); 725 ILL. COMP. STAT. ANN. § 5/109-1(b) ("The judge shall . . . [a]dvise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney . . . to represent him . . . ."); ME. R. CRIM. P. 44(a)(1) ("If the defendant in a proceeding in which the crime charged is [a qualifying offense] appears in any court without counsel, the court shall . . . assign counsel to represent the defendant . . . ."); MASS. R. CRIM. P. 7(a)(1) ("If the judge or special magistrate finds that the defendant is indigent . . . and has not knowingly waived the right to counsel . . . the Committee for Public Counsel Services shall be assigned to provide representation for the defendant."); N.H. REV. STAT. ANN. § 604-A:2(I) ("If . . . the commissioner of administrative services, is satisfied that the defendant is financially unable to obtain counsel, the court shall appoint counsel to represent him . . . ."); N.M. STAT. ANN. § 31-16-4(C) ("If the district court determines that the person is entitled to be represented by an attorney at public expense, it shall promptly assign an attorney who shall represent the person . . . ."); N.Y. R. UNIF. TRIAL CTS. § 200.26(c) ("Where it appears . . . that the defendant is financially unable to obtain counsel, the court shall . . . assign counsel."); OHIO R. CRIM. P. 44(A) ("Where a defendant charged with a serious offense is unable to obtain counsel, counsel shall be assigned to represent him . . . ."); PA. R. CRIM. P. 122(A)(2) ("Counsel shall be appointed . . . in all court cases, prior to the preliminary hearing to all defendants who are without financial resources or who are otherwise unable to employ counsel."); R.I. R. DIST. CT. R. CRIM. P. 44 ("If a defendant appears in District Court without counsel, [and is charged with a qualifying offense], the court . . . shall assign counsel to represent the defendant . . . ."); S.C. APP. CT. R. 602 ("The officer before whom the arrested person is taken shall . . . [i]f the accused represents that he is financially unable to employ counsel, take his application for the appointment of counsel," and upon a determination of indigency, "the Clerk of Court or other officer shall immediately notify the Office of Public Defender . . . and the Public Defender shall immediately thereafter enter upon the representation of the accused."); TENN. CODE ANN. § 40-14-202(a) ("In all felony cases, if the accused is not represented by counsel and the court determines . . . that the accused is an indigent person who has not competently waived the right to counsel, the court shall appoint to represent the accused either the public defender . . . or . . . a competent attorney licensed in this state."); VA. CODE ANN. § 19.2-159(C) (Once the court has made a determination of indigency, "said court shall appoint competent counsel to represent the accused . . . ."); WASH. SUP. CT. CRIM. R. 4.1(c) ("If the defendant is not represented and is unable to obtain counsel, counsel shall be assigned by the court, unless otherwise provided.").

In these jurisdictions, the onus is on the court, not the defendant, to ensure that the defendant is represented absent a valid waiver. Thus, a defendant is not even required to request appointment of counsel, much less affirmatively accept appointment after it is conferred. *See, e.g.*, *Bradford v. State*, 927 S.W.2d 329, 335 (Ark. 1996) (where "the Sixth Amendment right to counsel had clearly attached, and counsel had been appointed[,] [t]hough Bradford never formally requested counsel, the court's appointment provided a medium between herself and investigating officers "); FLA. R. CRIM. P. 3.111(d) ("The failure of a defendant to request appointment of counsel . . . shall not, in itself, constitute a waiver of counsel at any stage of the proceedings.").

In other jurisdictions where appointment is not automatic upon confirmation of indigency, courts are required to ask the defendant specifically if he wants to be represented, *see, e.g.*, CAL. PENAL CODE § 859; MICH. CT. R. 6.005(A); MONT. CODE ANN. § 46-8-101(1); OR. REV. STAT. § 135.040, and to guide eligible defendants toward court appointment. For example, in New Jersey, at the defendant's first court appearance, the judge is required to "ask the defendant specifically whether he or she wants counsel and record the defendant's answer on the complaint." N.J. R. CRIM. P. 3:4-2(b)(4). If the defendant asserts indigence and does not affirmatively waive his right to counsel, the judge must "*assure* that the defendant completes . . . and files" "the appropriate application form for public defender services." N.J. R. CRIM. P. 3:4-2(b)(5) (emphasis added). Qualifying defendants are referred to the Office of the Public Defender "no later than the pre-arraignment interview," and "[t]he defense counsel appointed by the Office of the Public Defender shall promptly file an appearance." N.J. R. CRIM. P. 3:8-3.

Finally, even in jurisdictions where a defendant is technically required to take the initiative to request counsel, *see* Appendix; *see, e.g.*, 16A ARIZ. REV. STAT. R. CRIM. P. 4.2(a); HAW. REV. STAT. § 802-3; MINN. STAT. ANN. § 611.16; MO. ANN. STAT. § 545.820; S.D. CODIFIED LAWS § 23A-40-6, this request is likely preceded and prompted by the court's constitutionally, and in some jurisdictions statutorily, compelled notice that the defendant has a right to counsel.[5] *See Johnson v. Zerbst,* 304 U.S. at 465 (refusing to accord legal significance to "an accused's ignorant failure to claim his rights"); *Carnley*, 369 U.S. at 513 (reiterating that the right to be furnished counsel does not depend upon a request and refusing to find waiver where "the record does not show that the trial judge offered and petitioner declined counsel"); *see, e.g.*, *Oliver v. State*, 918 S.W.2d 690, 693 (Ark. 1996) ("The trial court must do more than just make an inquiry [into an accused's ability to retain counsel]. The court must explain to the accused that he is entitled, as a matter of law, to an attorney and must question him to see if he can afford to hire counsel."); HAW. REV. STAT. § 802-2 (requiring courts to advise defendants of their right to counsel and court appointment "[i]n every criminal case or proceeding in which a person entitled by law to representation by counsel appears without counsel . . . ."); WIS. STAT. ANN. § 970.02(1)(b) ("At the initial appearance the judge shall inform the defendant . . . [o]f his or her right to counsel and, in any case required by the U.S. or Wisconsin constitution, that an attorney will be appointed to represent him or her if he or she is financially unable to employ counsel.").

Regardless of how the appointment of counsel is initiated—whether by unilateral judicial action, inquiry by the court, or the defendant's prompted request for a lawyer—the common practice across states is that courts take the initiative to ensure broad and presumptive representation of eligible defendants. It is always the State, not the defendant, that has control over the process of appointment. Certainly no interjection of acceptance of appointment is anticipated or required. The Court should reject Louisiana's post-court-ordered-appointment-unprompted-acceptance approach because it would disrupt this equitable status quo.

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[5] Notably, a number of these jurisdictions also give the trial court discretion to appoint counsel absent any request by the indigent defendant. *See, e.g.*, COLO. REV. STAT. ANN. § 21-1-103(1)(b); DEL. CODE ANN. tit. 29, § 4602(a); N.D. CENT. CODE § 29-07-01.1; UTAH CODE ANN. § 77-32-302(b).

II. SHIFTING THE FOCUS FROM THE COURT'S ACT OF APPOINTMENT TO AN INDIGENT DEFENDANT'S POST-APPOINTMENT RESPONSE TO DETERMINE IF THE DEFENDANT ENJOYS THE PROTECTION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL IS ILLOGICAL, UNFAIR, AND UNWORKABLE.

Even if this Court were to decide that a change to the equitable status quo is needed and that it is necessary to determine, outside the well-established context of waiver, whether a defendant desires court-appointed counsel, this Court should still reject Louisiana's post-court-ordered-appointment-unprompted-acceptance approach because it fails to meaningfully elucidate whether an indigent defendant who has received court-appointed counsel actually wants a lawyer. Indeed, far from limiting the Sixth Amendment protections to those defendants who desire counsel, for the reasons discussed below, Louisiana's approach will silently strip many defendants of representation who fully desire it and, as did Mr. Montejo, believe that they have counsel.

A. It is illogical to require a defendant to "accept" a court order that in all respects operates as binding on the defendant and the appointed attorney, irrespective of any actions or statements by the defendant.

A requirement that a defendant affirmatively assent to the appointment of counsel is entirely inconsistent with the binding nature of the appointment order: like all court orders it is a purely judicial act that enters into force at the moment it is pronounced, and unless it is rescinded or vacated, no party has the authority to refuse it.

Court orders in criminal cases do not require "acceptance" by the defendant to take effect; they are binding at the time of issuance. For example, the Louisiana Code of Criminal Procedure explains that "[a] court possesses inherently all powers necessary for the . . . enforcement of its lawful orders." LA. CODE CRIM. P. ANN. art. 17. Because a court possesses its own inherent power to effectuate orders, the acquiescence of the defendant is immaterial. *See, e.g.*, *People v. Russell*, 684 N.W.2d 745, 753 n.28 (Mich. 2004) ("Defendant's *acceptance* of the trial court's discretionary ruling [denying defendant's request to appoint another counsel] was not required."); *Edwards v. Hare*, 682 F. Supp. 1528, 1531 (D. Utah 1988) ("[t]he appointment of counsel is . . . an inherently judicial act").

The particular irrelevance of the defendant's response to the court's order appointing counsel is reflected in the fact that—whether a criminal defendant stands silent or interjects unprompted that he assents—the defendant is sufficiently bound by the order that he cannot escape the relationship without the express permission of the court. Thus, even where the defendant does nothing to suggest he has accepted court-ordered representation, the defendant cannot choose to be represented by another appointed attorney or dismiss the appointed attorney. In short, where a defendant is not authorized to say *no* to any aspect of the appointment, it is illogical to demand that he say *yes* to the same.

It is well-established that "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006). Defendants not only lack authority to modify the court's order by selecting appointed counsel of their choice, they also are unable to prevent the court from modifying the order and replacing appointed counsel with another attorney.[6] Defendants are likewise unable—regardless of whether they affirmatively "accepted" the attorney appointment—to dismiss the appointed counsel. Instead, "[a]fter a court appoints an attorney to represent an accused, a subsequent decision to replace that attorney is committed to the informed discretion of the appointing court." *United States v. Reyes*, 352 F.3d 511, 515 (1st Cir. 2003) (quotation marks and citation omitted).[7]

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[6] *E.g.*, *Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir. 1993) (defendant "was not entitled to have [a particular lawyer] reappointed, regardless of his desire to keep [the particular lawyer] as his counsel"); N.H. REV. STAT. ANN. § 604-A:3 (conferring power on court to substitute appointed counsel); TENN. CODE ANN. § 40-14-205(b) (same).

[7] *E.g.*, *United States v. Garey*, 540 F.3d 1253, 1263 (11th Cir. 2008); *United States v. Webster*, 84 F.3d 1056, 1062 (8th Cir. 1996); *United States v. Schaff*, 948 F.2d 501, 503 (9th Cir. 1991); *United States v. Gallop*, 838 F.2d 105, 108 (4th Cir. 1988);

The restrictions on a defendant's ability to influence the appointment order reflect the practical reality that without such rules, criminal courts risk being bogged down in incessant requests for particular attorneys or simply different attorneys from clients who, by definition, never chose their lawyers in the first instance.[8] Yet, presumably, if the failure to affirmatively accept an order of appointment means that the attorney-client relationship has not yet been established, defendants would not be bound

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United States v. Padilla, 819 F.2d 952, 955 (10th Cir. 1987); *Wilson v. Mintzes*, 761 F.2d 275, 280 (6th Cir. 1985); *United States v. Brown*, 744 F.2d 905, 908 (2d Cir. 1984); *United States v. Morris*, 714 F.2d 669, 673 (7th Cir. 1983); *United States v. Welty*, 674 F.2d 185, 188 (3d Cir. 1982); *United States v. Young*, 482 F.2d 993, 995 (5th Cir. 1973).

[8] *See, e.g.*, *United States v. Mooneyham*, 473 F.3d 280, 292 (6th Cir. 2007) (consideration of a defendant's request for new counsel must be weighed against "the public's interest in the prompt and efficient administration of justice") (quotation marks and citation omitted); *Reyes*, 352 F.3d at 515 (consideration of a defendant's request for new counsel must be weighed against "the public's interest in the prompt, fair and ethical administration of justice") (quotation marks and citations omitted); *United States v. Ely*, 719 F.2d 902, 905 (7th Cir. 1983) ("There are practical reasons for not giving indigent criminal defendants their choice of counsel . . . indigent defendants cannot be allowed to paralyze the system by all flocking to one lawyer."); *McKee v. Harris*, 649 F.2d 927, 931 (2d Cir. 1981) ("certain restraints must be put on the reassignment of counsel lest the right be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice") (quotation marks and citation omitted); *United States v. Davis*, 604 F.2d 474, 478 (7th Cir. 1979) (The "policy not to honor a defendant's request for the appointment of a particular attorney . . . is rational and reasonably necessary to the orderly administration of the system of providing defense services to those financially unable to retain counsel on their own.").

by the court's order. A trial court would have no power to prevent the defendant from terminating a relationship that had not officially begun, and the "orderly administration of the system of providing defense services" that the current rules are designed to protect would be jeopardized. *United States v. Davis*, 604 F.2d 474, 478 (7th Cir. 1979).

The reality that appointment of counsel is a decision resting solely in the court's hands is further reflected in the ability of the court to hold an attorney in contempt for refusing to accept the appointment.[9] Even in the absence of any evidence that the defendant has "accepted" the appointment, the attorney is bound by the court's order. Likewise, states often specify that attorneys may not withdraw from representation of indigent defendants without permission of the court.[10] It is not the defendant that the attorney turns to for permission to withdraw, but the court that issued the appointment order.

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[9] *E.g.*, *United States v. Accetturo*, 842 F.2d 1408, 1412 (3d Cir. 1988) (affirming contempt order in light of "inherent power [of courts] to appoint counsel, sometimes even over counsel's objection, to represent defendants in need of such representation"); *State v. Jones*, 726 S.W.2d 515, 521 (Tenn. 1987) (holding that attorney who refused to accept appointment to act as counsel for indigent defendant may be held in contempt, even though refusal premised on ethics opinion); *People v. Hutchinson*, 195 N.W.2d 787, 788 (Mich. Ct. App. 1972) (attorney's refusal to "undertake the defense of an indigent criminal defendant" constituted contempt); *see also Powell*, 287 U.S. at 65 ("Attorneys are officers of the court, and are bound to render service when required by such an appointment.").

[10] *E.g.*, ARK. R. CRIM. P. 8.2(c); S.C. APP. CT. R. 602(e)(2); TENN. CODE ANN. § 40-14-205(a); WASH. SUP. CT. CRIM. R. 3.1(e); *see also State v. Jones*, 923 P.2d 560, 562 (Mont. 1996) ("The grant or denial of a lawyer's motion to withdraw is within the discretion of the district court.").

A court order of appointment is further binding on counsel in that it triggers the attorney's obligations under the rules of professional responsibility. *See, e.g.*, Restatement (Third) of Law Governing Lawyers § 14(2) (2000) ("A relationship of client and lawyer arises when . . . a tribunal with power to do so appoints the lawyer to provide the services."); *id.* comment g ("When a court appoints a lawyer to represent a person, that person's consent may ordinarily be assumed absent the person's rejection of the lawyer's services.").[11] State ethical and professional standards for non-capital and capital cases make clear that it is *appointment* that triggers an attorney's obligation to interview the defendant,[12] assemble a defense team,[13] and begin investigating the case.[14] Adoption of an affirmative "acceptance" approach would thus place appointed attorneys in the peculiar position of having ethical and professional responsibilities to a person the court does not yet recognize as their client.[15]

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[11] *See also James v. Chase Manhattan Bank*, 173 F. Supp. 2d 544, 551 n.4 (N.D. Miss. 2001) ("The attorney's duties to his client arise when the attorney-client relationship is created, which, under Mississippi law, is when . . . 'a tribunal with power to do so appoints the lawyer to provide the services'") (quoting Restatement (Third) of Law Governing Lawyers § 14); *Burke v. Lewis*, 122 P.3d 533, 541-42 (Utah 2005) ("a lawyer-client relationship arises when . . . 'a tribunal with power to do so appoints the lawyer to provide the services'") (quoting Restatement (Third) of Law Governing Lawyers § 14); *In re Zamer G.*, 63 Cal. Rptr. 3d 769, 776 n.7 (Cal. Ct. App. 2007) ("For appointed counsel, the attorney-client relationship commences upon counsel's appointment.") (quotation marks, citation, and modification omitted).

[12] *E.g.*, Oregon Indigent Defense Performance Standards, Strd. 1.2 ("As soon as practicable after being retained or *appointed*, counsel should contact the client and conduct an initial client interview") (emphasis added); California Guidelines on Indigent Defense Services Delivery Systems (Dec. 1990) Part I, 7 ("Whenever possible, interviews of clients who are in custody should be conducted within 24-hours of *appointment*. Clients out of custody should be interviewed no later than 72 hours after *appointment* whenever possible.") (emphasis added); Guidelines of the Georgia Indigent Defense Counsel for the

In sum, it is illogical to suggest that a defendant must affirmatively "accept" court-ordered appointment for the purposes of the Sixth Amendment protection against police-initiated interrogations when, even in the absence of such "acceptance," the

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Operation of Local Indigent Defense Programs § 1.2 ("Counsel shall make contact with the person promptly after actual notice of *appointment*.") (emphasis added); Massachusetts Guidelines Governing Representation of Indigents in Criminal Cases § 1.3(b) ("counsel should visit the client [in custody] within three days of receiving the *assignment*.") (emphasis added); North Dakota Commission on Legal Counsel for Indigents, Minimum Attorney Performance Standards, Criminal Matters, Strd. 6.1 ("Counsel or a representative . . . should meet with incarcerated clients within 24 hours after *assignment* to the case.") (emphasis added); State Bar of Michigan Standards for Assigned Counsel § II(7) ("Counsel shall conduct a timely interview of the client after being *appointed* . . . .") (emphasis added).

[13] *E.g.*, Nevada Indigent Defense Standards of Performance, Strd. 2.6 ("As soon as possible after *appointment*, counsel should assemble a defense team . . . .") (emphasis added).

[14] *E.g.*, North Dakota Commission on Legal Counsel for Indigents, Minimum Attorney Performance Standards, Criminal Matters, Strd. 7.1(6) ("When appropriate, counsel should attempt to view the scene of the alleged offense as soon as possible after counsel is *appointed*.") (emphasis added).

[15] Appointed attorneys would be forced to weigh the requirement, for example, that they "make contact with the person promptly after actual notice of appointment," Guidelines of the Georgia Indigent Defense Counsel for the Operation of Local Indigent Defense Programs § 1.2, against the risk that any conversation would not be recognized as privileged.

order is self-effectuating and binds both the defendant and the appointed counsel in all respects.

B. It is unfair to demand that an indigent defendant interject unprompted his agreement with a court's appointment order.

An indigent defendant who is standing in the midst of the hustle and bustle of a crowded criminal court and is being rapidly processed in an intimidating don't-speak-unless-you're-spoken-to atmosphere has no reason to think he is required to make an unprompted statement to accept what the court has just given him. It is unjust to infer waiver of a fundamental right from a defendant's silence in this context.

To begin with, it is anomalous and unjust to consider the right to counsel of fundamental importance because of the common lack of understanding of the criminal justice process by defendants, *see* Point I.A. *supra*, while at the same time holding that an uncounseled defendant who fails to speak out at the proper time has affirmatively decided to forgo the fundamental protections of counsel. The need to accept that which one has already been given—by court order no less—is hardly intuitive. Indeed, it is just the type of formalistic, technical requirement that criminal defendants, particularly indigent defendants, "who are often unschooled in the intricacies of our criminal justice system," are unlikely either to be aware of or to understand. *United States v. Teague*, 908 F.2d 752, 759 (11th Cir. 1990) *rev'd on other grounds*, 953 F.2d 1525 (11th Cir. 1992) (en banc) (holding that "the absence of an on the record objection by the defendant himself" did not determine whether the defendant affirmatively decided not to testify); *see also Chang v. United States*, 250 F.3d 79, 84 (2d Cir. 2001) (refusing to penalize the defendant for his silence because "[a] defendant who is ignorant of the right to testify has no reason to seek to interrupt the proceedings to assert that right"); *United States v. Ortiz*, 82 F.3d 1066, 1071 (D.C. Cir. 1996) (rejecting rule "requiring that the defendant directly express to the court during the trial the desire to testify, in recognition of the impracticability of placing a burden on the defendant to assert a right of which he might not be aware . . . ."); *see also* Point I.A. *supra* (discussing the disabilities and impairments that are over-represented in the indigent defendant population).

Even were an indigent defendant able to discern a need to interject acceptance, a "defendant might well feel too intimidated to speak out of turn in this fashion." *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991); *see also State v. Robinson*, 982 P.2d 590, 597 (Wash. 1999) (refusing to "plac[e] the burden upon defendants to speak up in court to make their desire to testify known" because "defendants might feel 'too intimidated to speak out of turn'") (quoting *Underwood*, 939 F.2d at 476).

It is also likely that an indigent defendant has in fact been instructed by the court *not* to speak. "[R]outine instructions to defendants regarding the protocols of the court often include the admonition that they are to address the court only when asked to do so." *United States v. Mullins*, 315 F.3d 449, 455 (5th Cir. 2002) ("[d]eclining to place upon the defendant the responsibility to address the court directly" for this reason). Indeed, as a general rule, "in the interests of decorum and the smooth administration of justice, defendants who speak out of turn at their own trials are quickly reprimanded, and sometimes banned from the courtroom, by the court." *Teague*, 908 F.2d at 759. Furthermore, requiring an indigent defendant to interject unprompted his acceptance of the court's order is particularly unjust where, as part of the same proceeding where counsel is appointed, the defendant has typically just been admonished that "he need make no statement and any statement made may be used against him." OHIO R. CRIM. P. R. 5(A).[16]

The fact that "those untrained in the law do not usually understand their rights," *Swearingen v. State*, 18 P.3d 998, 1001 (Mont. 2001), coupled with the impairments of the indigent defendant population, the intimidating posture of facing "the awesome power of the State," *Brewer v. Williams*, 430 U.S. 387, 409 (1977) (Marshall, J., concurring), and the general rule that "[t]he defendant is expected to remain silent and speak only when spoken to," *People v. Brown*, 774 N.E.2d 186, 192 (N.Y. 2002), are all factors that "tend to discourage boldness, notwithstanding the occasional outburst by a defendant." *Ortiz*, 82 F.3d at 1072. It is unfair to punish an indigent defendant for failing to speak up unprompted in this context.

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[16] *See, e.g.*, COLO. CRIM. P. R. 5(a)(2) ("[I]t is the duty of the court to inform the defendant and make certain that the defendant understands . . . [that t]he defendant need make no statement and any statement made can and may be used against the defendant . . . . If indigent, the defendant has the right to request the appointment of counsel or consult with the public defender before any further proceedings are held."); IOWA CODE ANN R. 2.2(2) ("The magistrate shall inform a defendant . . . of the defendant's right to request the appointment of counsel if the defendant is unable by reason of indigency to obtain counsel . . . [and] that the defendant is not required to make a statement and that any statement made by the defendant may be used against the defendant."); KY. R. CRIM. P. 3.05 ("The defendant shall be informed . . . that he or she is not required to make a statement and that any statement made by him or her may be used against him or her. . . . [T]he judge shall appoint counsel to represent the defendant unless he or she elects to proceed without counsel."); N.D. R. CRIM. P. 5(b)(1) ("The magistrate must inform the defendant of . . . the defendant's right to remain silent; that any statement made by the defendant may later be used against the defendant; . . . the defendant's right to the assistance of counsel before making any statement or answering any questions; . . . the defendant's right to have legal services provided at public expense . . . .").

C. It is impractical and unworkable to make a fundamental constitutional right contingent on what is said or not said at a typically rushed, informal, and often unrecorded proceeding.

As discussed above, *see* Point I.B., most states do not currently have in place a colloquy or other mechanism for ascertaining a defendant's "acceptance" of the appointment of counsel; the standard operative presumption is that the court must appoint an attorney in the absence of a knowing and intelligent waiver or retention of private counsel. Indeed, the focus of these initial proceedings is often on processing crowded criminal dockets as efficiently as possible, as reflected in the common practice of informing defendants of their rights as a group. Moreover, these proceedings are often not recorded. As a result, a new approach that requires courts to determine whether a defendant affirmatively "accepted" the appointment of counsel would force judges to draw conclusions about this fundamental right on the basis of incomplete and imprecise records.

Many jurisdictions conduct the initial proceeding at which counsel is appointed in an expeditious manner, informing criminal defendants of their rights en masse.[17] Sometimes courts provide defendants with information about their constitutional rights in a written pamphlet or brochure.[18] The following account provides a snapshot of the nature of these proceedings in one jurisdiction, where prisoners arrested during the previous 24 hours are processed,

> during a period of time which can only be described as controlled chaos. The prisoners are brought into the chapel of the Dade County Jail at 9:00 a.m. They remain in the chapel during the initial appearances which are conducted by

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[17] *E.g.*, *State v. Fitch*, 753 So.2d 429, 433 (La. Ct. App. 2000) (acknowledging the practice); *D.C.W. v. State*, 775 So.2d 363, 364 (Fla. Dist. Ct. App. 2000) (same); *Isaac v. State*, 516 S.E.2d 575, 577 (Ga. Ct. App. 1999) (same); *Vernlund v. State*, 589 N.W.2d 307, 309 (Minn. Ct. App. 1999) (same); *State v. Berlin*, 588 N.W.2d 866, 867 (N.D. Ct. App. 1999) (same); *Jones v. State*, 442 S.E.2d 908, 909 (Ga. Ct. App. 1994) (same); *McMillan v. State*, 727 S.W.2d 582, 583-84 (Tex. Crim. App. 1987) (same); *see also* The Spangenberg Group, *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services*, 112 (June 2006) ("[I]n local courts with large dockets [in New York], some judges do not normally have the time to explain the right to counsel to each individual defendant, but provide a brief explanation to all persons sitting in courtrooms at the beginning of the docket.").

[18] *E.g.*, *State v. Bayer*, 656 N.E.2d 1314, 1318 (Ohio Ct. App. 1995) ("At the initial appearance . . . appellant was allegedly provided with a copy of a pamphlet prepared by the [Court] which appellee claims fulfilled these dictates [regarding informing defendant of risks of proceeding pro se]. Then, prior to addressing appellant directly, the court read a standardized introduction to all who were in the courtroom. . . . ") (footnote omitted); *Jones*, 442 S.E.2d at 909 (defendant "appeared at a mass arraignment and was provided a copy of a two-page document" which included information about the right to appointed counsel).

> video link to the courtroom across the street. The magistrate is in the courtroom along with an assistant state attorney, assistant public defender and any friends or relatives of the defendants who choose to attend. The defendants are handed the affidavits [of indigency] and then listen to video taped presentations by judges who advise them of their constitutional rights and inform them of the nature and purpose of the affidavits. The video taped instructions are played first in English, then in Spanish and then in Creole. After the videos are played the defendants use whatever time is left before the hearings begin at 10:00 a.m. to fill out the affidavits. During this time the screeners try to answer questions and assist with the completion of the affidavits.

Office of Public Defender v. State, 714 So. 2d 1083, 1086 n.3 (Fla. Dist. Ct. App. 1998) (Sorondo, J., specially concurring).[19] Louisiana's post-court-ordered-appointment-unprompted-acceptance approach is ill-suited to this type of group proceeding.

Another obstacle facing judges charged with reviewing a proceeding at which counsel was appointed is the reality that these proceedings are not consistently recorded. For example, in New York, the judges that "play the most significant role of any other judge in the state in deciding which defendants are appointed counsel," are the judges of the town and village courts: they have "trial jurisdiction in misdemeanors" and "preliminary jurisdiction for felony offenses." The Spangenberg Group, *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services*, 110, 104, iv (June 2006).[20] Town and villages courts are "the courts of first instance for a large number of defendants," *id.* at 110, but their "proceedings are not required to be on the record," *id.* at v, and they are not required to "officially report their decisions." *Id.* at 103. Just as the absence of a record from these courts often makes it "difficult or impossible for a defendant to adequately exercise the right to appeal a matter decided by a local justice," it would be similarly difficult to review a defendant's "acceptance" of the order of appointment. *Id.* at v.

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[19] This description was provided as "a factual background," in a case where a challenge was raised to the failure of magistrates to make indigency determinations before appointing counsel at the initial appearance, in contravention of the state rule. 714 So. 2d at 1086. "Although not necessary for the resolution of this case," *id.* at 1085, Judge Sorondo "elaborate[d] on the present system" to explain that the magistrates had adopted a practice that was inconsistent with the rule because the "enormous volume of cases" made it extremely difficult to balance "the need to appoint counsel to indigent defendants at the first appearance" with "securing independent corroboration" of defendants' indigency representations. *Id.* at 1086.

In the absence of a clear record of the hearing at which counsel is appointed, trial and appellate courts who review those proceedings face difficult problems of proof and may be required to hold evidentiary hearings and hear testimony from witnesses who were present at appointment. Thus for example, in *In re Pauley*, 318 S.E.2d 418 (W.Va. 1984), the reviewing court was forced to weigh the contentions of the magistrate judge against the testimony of the arresting officer regarding what happened "when [the magistrate judge] tried to advise [the defendant] of his rights." *Id.* at 421; *see also State v. Bayer*, 656 N.E.2d 1314, 1319 n.9 (Ohio Ct. App. 1995) (court considered affidavit from bailiff "aver[ing] that appellant was present in the courtroom when the statement [of rights] was read by the judge").[21]

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[20] As the Louisiana Supreme Court has noted, "the Spangenberg Group, [is] a nationally known firm expert in indigent defense systems." *State v. Peart*, 621 So.2d 780, 789 n.8 (La. 1993).

Addressing these problems would be prohibitively time-consuming and costly. The most recent available data from the Bureau of Justice Statistics shows that "[i]n 1999 indigent criminal defense providers in the 100 largest counties received 4.2 million cases." Carol J. DeFrances, Ph.D., Marika F. X. Litras, Ph.D., U.S. Dept. of Justice, *Indigent Defense Services in Large Counties, 1999*, p. 4 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/idslc99.pdf.[22] "The average number of cases per county was 43,480." *Id.* The magnitude of the indigent defense caseload is also reflected in data demonstrating that "approximately 66% of felony Federal defendants and 84% of felony defendants in large State courts were represented by public defenders or assigned counsel." Caroline Wolf Harlow, Ph.D., U.S. Dept. of Justice, Bureau of Justice Statistics, *Defense Counsel in Criminal Cases*, p. 1 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf.

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[21] *See generally State v. Bush*, 873 So. 2d 795, 799 (La. Ct. App. 2004) (noting that "there is no transcript and . . . the minute entry and commitment are silent as to whether defendant was advised of his right to counsel"); *State v. Clark*, 26 S.W.3d 448, 456 (Mo. Ct. App. 2000) ("[t]he entry is silent as to whether Appellant was informed of her right to counsel, whether she said she would retain counsel, or whether she requested appointed counsel"); *Benson v. State*, 160 P.3d 161, 163 (Alaska Ct. App. 2007) (record was not clear as to whether the defendant was eligible for the appointment of counsel because the court had "only the log notes of the hearing."); *see also Ebersole v. State*, 428 P.2d 947, 950 (Idaho 1967) ("The District Judge who presided at the [initial] proceedings was called as a witness by the state and testified" about what he remembered telling the defendant about the defendant's rights.).

[22] Because of the way data was collected, the 4.2 million case count is actually "an underestimate of the total number of indigent cases handled in those counties." *Id.* at 8.

In sum, replacing the procedure where a court orders the appointment of counsel and the defendant is not required to say anything with a process by which the judge is required to ascertain whether the defendant has accepted that appointment would impose an enormous burden on the courts and thwart the "state interest in the fair and efficient administration of justice." *Martinez*, 528 U.S. at 163. Criminal courts would be burdened not only by the introduction of a new procedural step in the initial proceeding for approximately four million indigent defendants, but by the need to consistently and accurately record and preserve the transcripts of all of those hearings.

* * *

An indigent defendant, although desirous of representation by court-appointed counsel, is highly unlikely to interject unprompted that he accepts a court's appointment order. Even if a defendant had the wherewithal to do so, there may not be a record of this assenting outburst. As a result, Louisiana's approach not only fails to elucidate whether an indigent defendant truly seeks representation, but actually thwarts representation of indigent defendants by subjecting them to unfair and illogical demands.

CONCLUSION

For all the reasons set forth above, *amici* respectfully request that the judgment of the Louisiana Supreme Court be reversed.

Respectfully submitted,

JO-ANN WALLACE
NATIONAL LEGAL AID &
DEFENDER ASSOCIATION
1140 Connecticut Avenue, NW
Suite 900
Washington, DC 20036
(202) 452-0620

CATHARINE F. EASTERLY
Counsel of Record
SANDRA K. LEVICK
RASHIDA J. OGLETREE
NINA W. CHERNOFF
PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF
COLUMBIA
633 Indiana Avenue, NW
Washington, DC 20004
(202) 628-1200

Counsel for Amici Curiae

November 24, 2008

APPENDIX

APPENDIX OF STATE STATUTES AND RULES GOVERNING PROVISION OF COUNSEL TO INDIGENT DEFENDANTS [1]

Alabama

- The court or its agents must inquire about a defendant's financial status. ALA. CODE § 15-12-5(a) ("The trial judge first having cognizance of a criminal or juvenile proceeding in his court shall determine if an accused person or petitioner for postconviction relief is an indigent defendant.").

- The court automatically appoints counsel upon a finding of indigency. ALA. CODE § 15-12-5(d) ("The judge making a determination of indigency shall provide legal representation for the indigent defendant.").

Alaska

- The court automatically appoints counsel upon a finding of indigency. ALASKA STAT. §18.85.100(d) ("If a court determines . . . that an indigent person is entitled to representation by an attorney at public expense, the court shall promptly notify the agency or the office of public advocacy.").

Arizona

- The court must advise the defendant of the right to counsel. 16A ARIZ. REV. STAT. R. CRIM. P. 4.2(a)(5) ("At the suspect's initial appearance, the magistrate shall . . . [i]nform the defendant of the right to counsel . . . .").

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[1] This appendix includes every state and the District of Columbia, with the exception of Louisiana and Mississippi which, pursuant to their case law, adopt a post-court-ordered-appointment-unprompted-acceptance approach to determining when a defendant is represented.

- The court appoints counsel upon the defendant's request. 16A Ariz. Rev. Stat. R. Crim. P. 4.2(a)(5) ("At the suspect's initial appearance, the magistrate shall . . . [a]ppoint counsel if the suspect is eligible for and requests appointed counsel.").

Arkansas

- The court or its agents must inquire about a defendant's financial status. ARK. R. CRIM. P. 8.2(a) ("An accused's desire for, and ability to retain, counsel should be determined by a judicial officer before the first appearance, whenever practicable.").
- The court automatically appoints counsel upon a finding of indigency. ARK. R. CRIM. P. 8.2(b) ("Whenever an indigent is charged with a criminal offense and, upon being brought before any court, does not knowingly and intelligently waive the appointment of counsel, the court shall appoint counsel to represent the indigent.").

California

- The court must ask the defendant if he wants court-appointed counsel. CAL. PENAL CODE § 859 ("The magistrate shall immediately deliver to the defendant a copy of the complaint, inform the defendant that he or she has the right to have the assistance of counsel, ask the defendant if he or she desires the assistance of counsel, and allow the defendant reasonable time to send for counsel.").

Colorado

- The court must advise the defendant of the right to counsel. COLO. REV. STAT. ANN. § 5(2) ("At the first appearance of the defendant in court, it is the duty of the court to inform the defendant and make certain that the defendant understands . . . (II) The right to counsel; (III) If indigent, the defendant has the right to request the appointment of counsel or consult with the public defender before any further proceedings are held . . . .").

- The court appoints counsel upon the defendant's request or upon the court's own motion. COLO. REV. STAT. ANN. § 21-1-103(1)(a) ("The state public defender shall represent as counsel . . . each indigent person who is under arrest for or charged with committing a felony if: (a) The defendant requests it . . . ."); COLO. REV. STAT. ANN. § 21-1-103(1)(b) ("The state public defender shall represent as counsel . . . each indigent person who is under arrest for or charged with committing a felony if . . . [t]he court, on its own motion or otherwise, so orders and the defendant does not affirmatively reject, of record, the opportunity to be represented by legal counsel in the proceeding.").

Connecticut

- The court or its agents must inquire about a defendant's financial status. CONN. GEN. STAT. ANN. § 37-1 ("The judicial authority shall refer the defendant to the public defender for an investigation of indigency . . . .").

- The court automatically appoints counsel upon a finding of indigency. CONN. GEN. STAT. ANN. § 37-1 ("If the judicial authority determines after investigation by the public defender that the defendant is indigent, the judicial authority may designate the public defender or a special public defender to represent the defendant.").

Delaware

- The court appoints counsel upon the defendant's request or upon the court's own motion. Del. Code Ann. tit. 29, § 4602(a) ("The Public Defender shall represent, without charge, each indigent person who is under arrest or charged with a crime, if: (1) The defendant requests it . . . ."); Del. Code Ann. tit. 29, § 4602(b) ("The Public Defender shall represent, without charge, each indigent person who is under arrest or charged with a crime, if . . . (2) The court, on its own motion or otherwise, so orders and the defendant does not affirmatively reject of record the opportunity to be so represented.").

District of Columbia

- The court or its agents must inquire about a defendant's financial status. D.C. Code § 11-2602 ("Unless the defendant or respondent waives representation by counsel, the court, if satisfied after appropriate inquiry that the defendant or respondent is financially unable to obtain counsel, shall appoint counsel to represent that person.").
- The court automatically appoints counsel upon a finding of indigency. D.C. Code § 11-2602 ("Unless the defendant or respondent waives representation by counsel, the court, if satisfied after appropriate inquiry that the defendant or respondent is financially unable to obtain counsel, shall appoint counsel to represent that person.").

Florida

- The court or its agents must inquire about a defendant's financial status. Fla. R. Crim. P. 3.111(b)(5)(B) ("Before appointing a public defender, the court shall . . . make inquiry into the financial status of the accused . . . . The accused shall respond to the inquiry under oath.").

- The court automatically appoints counsel upon a finding of indigency. FLA. R. CRIM. P. 3.111(a) ("A person entitled to appointment of counsel as provided herein shall have counsel appointed when the person is formally charged with an offense, or as soon as feasible after custodial restraint, or at the first appearance before a committing judge, whichever occurs earliest.").

Georgia

- The court or its agents must inquire about a defendant's financial status. GA. CODE ANN. § 17-12-24(a) ("The circuit public defender . . . shall determine if a person or juvenile arrested, detained, or charged in any manner is an indigent person entitled to representation under this chapter.").
- The court must ask the defendant if he wants court-appointed counsel. GA. UNIF. R. SUP. CT. 26.1(C) ("At the first appearance, the judicial officer shall . . . [d]etermine whether or not the accused desires and is in need of an appointed attorney . . . ."); GA. UNIF. R. MAG. CT. 25.1 ("At the first appearance, the judicial officer shall . . . [d]etermine whether or not the accused desires and is in need of an appointed attorney . . . .").

Hawaii

- The court must advise the defendant of the right to counsel. HAW. REV. STAT. § 802-2 ("In every criminal case or proceeding in which a person entitled by law to representation by counsel appears without counsel, the judge shall advise the person of the person's right to representation by counsel and also that if the person is financially unable to obtain counsel, the court may appoint one at the cost to the State.").

- The court appoints counsel upon the defendant's request. HAW. REV. STAT. § 802-3 ("Any person entitled to representation by a public defender or other appointed counsel may at any reasonable time request any judge to appoint counsel to represent the person.").

Idaho

- The court automatically appoints counsel upon a finding of indigency. IDAHO CODE ANN. § 19-853(c) ("If a court determines that the person is entitled to be represented by an attorney at public expense, it shall promptly notify the public defender or assign an attorney, as the case may be.").

Illinois

- The court automatically appoints counsel upon a finding of indigency. 725 ILL. COMP. STAT. ANN. § 5/109-1(b) ("The judge shall . . . [a]dvise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney at law of this State to represent him.").

Indiana

- The court or its agents must inquire about a defendant's financial status. IND. CODE ANN. § 35-33-7-6(a) ("Prior to the completion of the initial hearing, the judicial officer shall determine whether a person who requests assigned counsel is indigent.").

- The court must advise the defendant of the right to counsel. IND. CODE ANN. § 35-33-7-5 ("At the initial hearing of a person, the judicial officer shall inform him orally or in writing: (1) that he has a right to retain counsel . . . .").
- The court appoints counsel upon the defendant's request. IND. CODE ANN. § 35-33-7-6(a) ("If the person [who requests assigned counsel] is found to be indigent, the judicial officer shall assign counsel to the person.").

Iowa

- The court must ask the defendant if he wants court-appointed counsel. IOWA R. CRIM. P. 2.8(1) ("If the defendant appears for arraignment without counsel, the court must, before proceeding further, inform the defendant of the right to counsel and ask if the defendant desires counsel; and if the defendant does, and is unable by reason of indigency to employ any, the court must appoint defense counsel . . . .").

Kansas

- The court automatically appoints counsel upon a finding of indigency. KAN. STAT. ANN. § 22-4503(c) ("If it is determined that the defendant is not able to employ counsel . . . the court shall appoint an attorney from the panel for indigents' defense services or otherwise in accordance with the applicable system for providing legal defense services for indigent persons prescribed by the state board of indigents' defense services for the county or judicial district.").

Kentucky

- The court automatically appoints counsel upon a finding of indigency. KY. R. CRIM. P. 3.05(2) ("If . . .

the defendant is financially unable to employ counsel, the judge shall appoint counsel to represent the defendant unless he or she elects to proceed without counsel.").

Maine

- The court or its agents must inquire about a defendant's financial status. ME. R. CRIM. P. 44(b) ("The court shall determine whether a defendant has sufficient means with which to employ counsel and in making such determination may examine the defendant under oath concerning the defendant's financial resources.").
- The court automatically appoints counsel upon a finding of indigency. ME. R. CRIM. P. 44(a)(1) ("If the defendant in a proceeding in which the crime charged is murder or a Class A, Class B, or Class C crime appears in any court without counsel, the court shall advise the defendant of the defendant's right to counsel and assign counsel to represent the defendant at every stage of the proceeding unless the defendant elects to proceed without counsel or has sufficient means to employ counsel.").

Maryland

- The court must advise the defendant of the right to counsel. MD. R. 4-215 ("At the defendant's first appearance in court without counsel . . . the court shall: (1) Make certain that the defendant has received a copy of the charging document containing notice as to the right to counsel."); MD. R. 4-202(a) ("A charging document . . . shall contain [the admonition that] . . . 3. You have the right to have a lawyer. 4. A lawyer can be helpful to you by: (A) explaining the charges in this paper; (B) telling you the possible penalties; (C) helping you at trial; (D) helping you protect your constitutional rights; and (E) helping you to get a fair penalty if convicted. 5. Even if you plan to plead guilty, a lawyer can be helpful.").

- The court appoints counsel upon the defendant's request. *See* MD. R. 4-202(a) ("A charging document also shall contain [the admonition that] . . . 6. If you want a lawyer but do not have the money to hire one, the Public Defender may provide a lawyer for you. The court clerk will tell you how to contact the Public Defender. 7. If you want a lawyer but you cannot get one and the Public Defender will not provide one for you, contact the court clerk as soon as possible. 8. DO NOT WAIT UNTIL THE DATE OF YOUR TRIAL TO GET A LAWYER. If you do not have a lawyer before the trial date, you may have to go to trial without one.").

Massachusetts

- The court or its agents must inquire about a defendant's financial status. MASS. R. CRIM. P. 7(a)(1) ("[T]he probation department shall make a report to the court of the pertinent information reasonably necessary to determination of the issues of bail and indigency.").
- The court automatically appoints counsel upon a finding of indigency. MASS. R. CRIM. P. 7(a)(1) ("If the judge or special magistrate finds that the defendant is indigent or indigent but able to contribute and has not knowingly waived the right to counsel under the procedures established in Supreme Judicial Court Rule 3:10, the Committee for Public Counsel Services shall be assigned to provide representation for the defendant.").

Michigan

- The court must ask the defendant if he wants court-appointed counsel. MICH. CT. R. 6.005(A) ("At the arraignment on the warrant or complaint, the court must advise the defendant . . . of entitlement to a lawyer's assistance at all subsequent court proceedings, and . . . that the court will appoint a lawyer at public expense if the defendant wants one and is financially unable to retain one. The court must question the defendant to determine whether the defendant wants a lawyer and, if so, whether the defendant is financially unable to retain one.").

Minnesota

- The court must advise the defendant of the right to counsel. 49 MINN. R. CRIM. P. 5.02(1) ("[T]he court shall advise the defendant of the right to counsel and the appointment of the district public defender if the defendant has been determined to be financially unable to afford counsel.").
- The court appoints counsel upon the defendant's request. MINN. STAT. ANN. § 611.16 ("Any person . . . entitled by law to representation by counsel, may at any time request the court in which the matter is pending, or the court in which the conviction occurred, to appoint a public defender to represent the person.").

Missouri

- The court appoints counsel upon the defendant's request. MO. ANN. STAT. § 545.820 ("it shall be the duty of the court to assign him counsel, at his request"); MO. ANN. STAT. § 600.048(2) ("A person . . . may request that legal representation be furnished to him by the state.").

Montana

- The court must ask the defendant if he wants court-appointed counsel. MONT. CODE. ANN. § 46-8-101(1) ("During the initial appearance before the court, every defendant must be informed of the right to have counsel and must be asked if the aid of counsel is desired.").

Nebraska

- The court automatically appoints counsel upon a finding of indigency. NEB. REV. ST. § 29-3902 ("At a felony defendant's first appearance before a court . . . [i]f the court determines him or her to be indigent, it shall formally appoint the public defender to represent him or her . . . .").

Nevada

- The court must advise the defendant of the right to counsel. NEV. R. CRIM. P. 171.186 ("The magistrate or master shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel . . . .").
- The court appoints counsel upon the defendant's request. NEV. R. CRIM. P. 171.188(1) ("Any defendant charged with a public offense who is an indigent may, by oral statement to the district judge, justice of the peace, municipal judge or master, request the appointment of an attorney to represent him.").

New Hampshire

- The court automatically appoints counsel upon a finding of indigency. N.H. REV. STAT. ANN. § 604-A:2(I) ("If . . . the commissioner of administrative services, is satisfied that the defendant is financially unable to obtain counsel, the court shall appoint counsel to represent him.").

New Jersey

- The court must ask the defendant if he wants court-appointed counsel. N.J. R. CRIM. P. 3:4-2(b) ("At the defendant's first appearance before a judge . . . the judge shall . . . ask the defendant specifically whether he or she wants counsel and record the defendant's answer on the complaint.").

New Mexico

- The court automatically appoints counsel upon a finding of indigency. N.M. STAT. ANN. § 31-16-4(C) ("If the district court determines that the person is entitled to be represented by an attorney at public expense, it shall promptly assign an attorney who shall represent the person in accordance with the terms of his assignment.").

New York

- The court automatically appoints counsel upon a finding of indigency. N.Y. R. UNIF. TRIAL. CTS. § 200.26(c) ("Where it appears, pursuant to paragraph (ii) of subdivision (b) of this section, that the defendant is financially unable to obtain counsel, the court shall, prior to issuing a securing order fixing bail or committing the defendant to the custody of the sheriff, assign counsel.").

North Carolina

- The court automatically appoints counsel upon a finding of indigency. N.C. GEN. STAT. § 7A-450(b) ("Whenever a person, under the standards and procedures set out in this Subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation.").

North Dakota

- The court must advise the defendant of the right to counsel. N.D. R. CRIM. P. 5(b)(1) ("The magistrate must inform the defendant of the following . . . (C) the defendant's right to the assistance of counsel before making any statement or answering any questions; (D) the defendant's right to be represented by counsel at each and every stage of the proceedings . . . .").
- The court appoints counsel upon the defendant's request or upon the court's own motion. N.D. CENT. CODE § 29-07-01.1 ("A defendant requesting representation by counsel at public expense, or for whom counsel provided at public expense without a request is considered appropriate by the court, shall submit an application for indigent defense services.").

Ohio

- The court or its agents must inquire about a defendant's financial status. OHIO R. CRIM. P. 44(D) ("The determination of whether a defendant is able or unable to obtain counsel shall be made in a recorded proceeding in open court.").
- The court automatically appoints counsel upon a finding of indigency. OHIO R. CRIM. P. 44(A) ("Where a defendant charged with a serious offense is unable to obtain counsel, counsel shall be assigned to represent him at every stage of the proceedings from his initial appearance before a court through appeal as of right, unless the

defendant, after being fully advised of his right to assigned counsel, knowingly, intelligently, and voluntarily waives his right to counsel . . . .").

Oklahoma

- The court must advise the defendant of the right to counsel. OKLA. STAT. tit. 22, § 251 ("When the defendant is brought before a magistrate upon an arrest, either with or without a warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and also of his right to waive an examination before any further proceedings are had.").
- The court appoints counsel upon the defendant's request. *See* OKLA. STAT. tit. 22, § 1355A(1) ("When an indigent requests representation by the Oklahoma Indigent Defense System, such person shall submit an appropriate application to the court clerk, which shall state that the application is signed under oath and under the penalty of perjury and that a false statement may be prosecuted as such.").

Oregon

- The court must ask the defendant if he wants court-appointed counsel. OR. REV. STAT. § 135.040 ("If the defendant appears for arraignment without counsel, the defendant shall be informed by the court that it is the right of the defendant to have counsel before being arraigned and shall be asked if the defendant desires the aid of counsel."); OR. REV. STAT. § 135.045(1)(a) ("If the defendant in a criminal action appears without counsel at arraignment or thereafter, the court shall determine whether the defendant wishes to be represented by counsel.").

Pennsylvania

- The court automatically appoints counsel upon a finding of indigency. PA. R. CRIM. P. 122(A)(2) ("Counsel shall be appointed . . . in all court cases, prior to the preliminary hearing to all defendants who are without financial resources or who are otherwise unable to employ counsel.").

Rhode Island

- The court automatically appoints counsel upon a finding of indigency. R.I. R. DIST. CT. R. CRIM. P. 44 ("If the offense charged is punishable by imprisonment for a term of more than six months or by a fine in excess of $500, the court shall advise the defendant of his or her right to assignment of counsel and shall assign counsel to represent the defendant at every stage of the proceeding unless the defendant is able to obtain his or her own counsel or elects to proceed without counsel.").

South Carolina

- The court automatically appoints counsel upon a finding of indigency. S.C. APP. CT. R. 602 ("The officer before whom the arrested person is taken shall . . . [a]dvise the accused of his right to counsel and of his right to the appointment of counsel by the court, if the accused is financially unable to employ counsel. If the accused represents that he is financially unable to employ counsel, take his application for the appointment of counsel or for the services of the Public Defender where the latter is available in the county. . . . If application for counsel is approved for the accused, the Clerk of Court or other officer shall immediately notify the Office of Public Defender, if one exists in the county, and the Public Defender shall immediately thereafter enter upon the representation of the accused. If there is no Public Defender for the county, then the Clerk of Court or other officer shall immediately notify the court, or such person as the resident judge may designate, of the request for counsel and appointment of counsel shall be made immediately with prompt notification thereof to the accused and counsel so appointed.").

South Dakota

- The court must advise the defendant of the right to counsel. S.D. CODIFIED LAWS § 23A-4-3 ("The committing magistrate shall inform the defendant . . . of the defendant's right to retain counsel and to request assignment of counsel if the defendant is unable to obtain counsel . . . .").
- The court appoints counsel upon the defendant's request. S.D. CODIFIED LAWS § 23A-40-6 ("if it is satisfactorily shown that the defendant or detained person does not have sufficient money, credit, or property to employ counsel and pay for the necessary expenses of his representation, the judge of the circuit court or the magistrate shall, upon the request of the defendant, assign, at any time following arrest or commencement of detention without formal charges, counsel for his representation . . . ."); *but see State ex rel. Warner v. Jameson*, 91 N.W.2d 743, 745 (S.D. 1958) ("When an accused appears for arraignment he is required to demand or waive counsel immediately. . . . Therefore *before an accused is asked* whether or not he desires the aid of counsel he should first be

fully informed of his rights in this regard.") (emphasis added).

Tennessee

- The court automatically appoints counsel upon a finding of indigency. TENN. CODE ANN. § 40-14-202(a) ("In all felony cases, if the accused is not represented by counsel and the court determines by the manner provided in subsection (b) that the accused is an indigent person who has not competently waived the right to counsel, the court shall appoint to represent the accused either the public defender, if there is one for the county, or, in the absence of a public defender, a competent attorney licensed in this state.").

Texas

- The court must advise the defendant of the right to counsel. TEX. CODE. CRIM. P. ANN. art. 15.17 ("The magistrate shall inform in clear language the person arrested . . . of his right to retain counsel . . . [and] of the person's right to request the appointment of counsel if the person cannot afford counsel.").
- The court appoints counsel upon the defendant's request. TEX. CODE. CRIM. P. ANN. art. 1.051(c) ("Except as otherwise provided by this subsection, if an indigent defendant is entitled to and requests appointed counsel and if adversarial judicial proceedings have been initiated against the defendant, a court or the courts' designee authorized under Article 26.04 to appoint counsel for indigent defendants in the county shall appoint counsel as soon as possible . . . .").

Utah

- The court must advise the defendant of the right to counsel. UTAH R. CRIM. P. 7(e)(3) ("The magistrate having jurisdiction over the offense charged shall, upon the defendant's first appearance, inform the defendant . . . of the right to retain counsel or have counsel appointed by the court without expense if unable to obtain counsel . . . .").

- The court appoints counsel upon the defendant's request or upon the court's own motion. UTAH CODE ANN. § 77-32-302 (1)(a) ("Legal counsel shall be assigned to represent each indigent and the indigent shall also be provided access to defense resources necessary for an effective defense, if the indigent is under arrest for or charged with a crime in which there is a substantial probability that the penalty to be imposed is confinement in either jail or prison if: (a) the indigent requests counsel or defense resources, or both . . . ."); UTAH CODE ANN. § 77-32-302(b) ("Legal counsel shall be assigned to represent each indigent . . . if . . . (b) the court on its own motion or otherwise orders counsel, defense resources, or both and the defendant does not affirmatively waive or reject on the record the opportunity to be represented and provided defense resources.").

Vermont

- The court automatically appoints counsel upon a finding of indigency. VT. STAT. ANN. tit. 13, § 5234(a)(2) ("If the person detained or charged does not have an attorney and does not knowingly, voluntarily and intelligently waive his right to have an attorney when detained or charged, notify the appropriate public defender that he is not so represented. This shall be done upon commencement of detention, formal charge, or post-conviction proceeding, as the case may be."); VT. STAT. ANN. tit. 13, § 5235 ("If a law enforcement officer, magistrate, or court determines that a person is entitled to be represented by an attorney at public expense, the officer, magistrate, or court, as the case may be, shall promptly notify the appropriate public defender.").

Virginia

- The court or its agents must inquire about a defendant's financial status. VA. CODE ANN. § 19.2-159(C) ("The court shall also require the accused to complete a written financial statement to support the claim of indigency and to permit the court to determine whether or not the accused is indigent within the contemplation of law. The accused shall execute the said statements under oath, and the said court shall appoint competent counsel to represent the accused.").
- The court automatically appoints counsel upon a finding of indigency. VA. CODE ANN. § 19.2-159(A) ("If the accused shall claim that he is indigent, and the charge against him is a [qualifying] criminal offense . . . the court shall determine . . . whether or not the accused is indigent within the contemplation of law pursuant to the guidelines set forth in this section . . . . If the accused does not waive his right to counsel or retain counsel on his own behalf, counsel shall be appointed for the accused if" he is financially eligible.).

Washington

- The court automatically appoints counsel upon a finding of indigency. WASH. SUP. CT. CRIM. R.

3.1(d)(1) ("Unless waived, a lawyer shall be provided to any person who is financially unable to obtain one without causing substantial hardship to the person or to the person's family."); WASH. SUP. CT. CRIM. R. 4.1(c) ("If the defendant appears without counsel, the court shall inform the defendant of his or her right to have counsel before being arraigned. The court shall inquire if the defendant has counsel. If the defendant is not represented and is unable to obtain counsel, counsel shall be assigned by the court, unless otherwise provided.").

West Virginia

- The court must advise the defendant of the right to counsel. W. VA. CODE § 62-1-6 ("The justice shall in plain terms inform the defendant of the nature of the complaint against him, of his right to counsel . . . .").
- The court appoints counsel upon the defendant's request. W. VA. CODE § 5C 4-3 ("In the event a defendant requests that counsel be appointed and executes an affidavit that he is unable to afford counsel, the magistrate shall stay further proceedings and shall request the judge of the circuit court, or the chief judge thereof . . . shall thereupon appoint counsel.").

Wisconsin

- The court must advise the defendant of the right to counsel. WIS. STAT. ANN. § 970.02(6) ("In all cases in which the defendant is entitled to legal representation under the constitution or laws of the United States or this state, the judge or magistrate shall inform the defendant of his or her right to counsel and, if the defendant claims or appears to be indigent, shall refer the person to the authority for indigency determinations specified under s. 977.07(1).").

- The court appoints counsel upon the defendant's request. WIS. STAT. ANN. § 967.06(2)(a) ("[A] person entitled to counsel . . . who indicates at any time that he or she wants to be represented by a lawyer, and who claims that he or she is not able to pay in full for a lawyer's services, shall immediately be permitted to contact the authority for indigency determinations . . . .").

Wyoming

- The court must advise the defendant of the right to counsel. WYO. STAT. ANN. § 7-6-105(b) ("At the person's initial appearance the court shall advise any defendant who is a needy person of his right to be represented by an attorney at public expense.").
- The court appoints counsel upon the defendant's request. WYO. STAT. ANN. § 7-6-105(b) ("If the person charged does not have an attorney and wishes one, the court shall notify an available public defender for the judicial district or shall appoint an attorney to represent the needy person if no public defender is available."); WYO. R. CRIM. P. 44(b)(1) ("An attorney should be appointed at the earliest time after a defendant makes a request, but only after appropriate inquiry into the defendant's financial circumstances and a determination of eligibility.").

AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
FILED
DEC 24 2008
OFFICE OF THE CLERK

No. 07-1529

In The Supreme Court of the United States

◆

JESSIE JAY MONTEJO,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

◆

On Writ Of Certiorari To The Supreme Court Of Louisiana

◆

BRIEF FOR THE STATES OF NEW MEXICO, ALABAMA, ARIZONA, COLORADO, DELAWARE, FLORIDA, IDAHO, KANSAS, MARYLAND, NEW HAMPSHIRE, OKLAHOMA, OREGON, PENNSYLVANIA, UTAH, VIRGINIA, WASHINGTON, AND WYOMING, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

◆

GARY K. KING
Attorney General of New Mexico

M. VICTORIA WILSON
Counsel of Record
Assistant Attorney General
111 Lomas Blvd. NW, Suite 300
Albuquerque, NM 87102
(505) 222-9061

Counsel for Amici Curiae

[Additional Counsel On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TROY KING
Attorney General
of Alabama

TERRY GODDARD
Arizona Attorney General

JOHN W. SUTHERS
Colorado Attorney General

RICHARD S. GEBELEIN
Chief Deputy
Attorney General
State of Delaware

BILL MCCOLLUM
Attorney General
of Florida

LAWRENCE G. WASDEN
Idaho Attorney General

STEVE SIX
Attorney General
State of Kansas

DOUGLAS F. GANSLER
Attorney General
of Maryland

KELLY A. AYOTTE
Attorney General of
New Hampshire

W.A. DREW EDMONDSON
Attorney General
of Oklahoma

HARDY MYERS
Attorney General of Oregon

THOMAS W. CORBETT, JR.
Attorney General
Commonwealth of
Pennsylvania

MARK L. SHURTLEFF
Utah Attorney General

ROBERT F. MCDONNELL
Attorney General
of Virginia

ROBERT M. MCKENNA
Attorney General
of Washington

BRUCE A. SALZBURG
Wyoming Attorney General

QUESTION PRESENTED

When an indigent defendant's right to counsel has attached and counsel has been appointed, must the defendant take affirmative action or make an affirmative statement accepting the appointment or otherwise indicating an assertion of the right to counsel in order to secure the protections of the prophylactic rule of *Michigan v. Jackson*, 475 U.S. 625 (1986), that police are precluded from obtaining a waiver of the right to counsel and initiating an interrogation of a formally-charged defendant after the defendant has asserted the right to counsel?

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INTEREST OF THE *AMICI CURIAE*

The *Amici* States have a direct interest in this case because resolution of the question presented will affect the States' "compelling interest in finding, convicting, and punishing those who violate the law." *See Moran v. Burbine*, 475 U.S. 412, 426 (1986). The prophylactic rule adopted in *Michigan v. Jackson*, 475 U.S. 625 (1986), is designed to deter police from badgering a defendant into waiving the right to counsel during a custodial interrogation, while maintaining the proper balance between the defendant's right and society's interest in effective enforcement of criminal laws. The *Amici* States have an interest in the application of *Jackson* in a manner that does not intrude on the societal interest in effective law enforcement more than is necessary to protect a defendant's Sixth Amendment right to counsel, and more than is necessary to establish an administrable rule for police to know when they may not initiate an interview of a defendant whose right to counsel has attached.

◆

SUMMARY OF THE ARGUMENT

I. The Sixth Amendment establishes a formally-charged defendant's right to counsel but does not force the assistance of counsel on a defendant who chooses not to have counsel. *See* U.S. Const. amend. VI. As a prophylactic measure to ensure that a defendant's choice to use counsel is honored, the Court adopted the rule, announced in *Michigan v. Jackson*, 475 U.S. 625 (1986), that police may not obtain a waiver of the right to counsel and initiate an interview of a formally-charged defendant after the defendant has asserted his right to counsel. A State, however, cannot honor a choice that has not been made. As a result, this Court has limited the *Jackson* rule to cases in which the defendant either retained or requested the assistance of counsel.

This case presents the question whether the *Jackson* rule should be extended to a defendant who neither retained nor requested the assistance of counsel and, having been appointed counsel, has not accepted the appointment. *Amici* assert that it should not. When a defendant has not requested, retained or accepted counsel, the defendant has not conveyed a choice to communicate to police only through counsel. Thus, the prophylactic *Jackson* rule should be limited to defendants who have asserted the right to counsel by an affirmative statement or action indicating their choice.

So limited, the *Jackson* rule preserves a defendant's ability to choose to communicate with police either with or without counsel. Allowing a defendant to waive his right to counsel and voluntarily choose to talk to police without counsel strikes a balance between society's compelling interest in effective law enforcement and defendants' Sixth Amendment right. It also recognizes that the States' "ability to obtain uncoerced confessions is not an evil, but an unmitigated good". *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991).

The plain language of *Jackson*, as well as the Court's application of *Jackson* in later cases, establishes the requirement of an affirmative assertion of the right to counsel, which cannot occur by the mere acquiescence in the appointment of counsel. In *Jackson*, the Court repeatedly specified that the prophylactic rule applies to defendants who have "requested" or "asserted" the right to counsel. Only an *affirmative* assertion serves the purposes of deterring police from badgering defendants into waiving the right to counsel and balancing the societal interest in effective law enforcement with the individual's right to counsel.

Moreover, *Jackson*'s grounding in the prophylactic rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), which requires an unambiguous assertion of the right to have counsel present during a pre-indictment custodial interrogation, compels the requirement of an affirmative assertion of the right to counsel under *Jackson*. The requirement of an affirmative assertion under *Jackson* is also consistent with this Court's decision in *Patterson v. Illinois*, 487 U.S. 285, 291 (1988), holding that a formally-charged defendant who has not requested counsel may voluntarily choose to speak with police without counsel. It is the affirmative assertion of the right to counsel, and not the mere existence of an attorney-client relationship, that conveys the defendant's choice to communicate to police only through counsel.

II. Although the *Jackson* rule does not extend to this case, the facts of this case demonstrate the inherent flaw in the premise underlying the rule. The premise of the *Jackson* rule is that a defendant who requests counsel at arraignment implicitly chooses to have the assistance of counsel in a custodial interrogation. That premise is flawed because, at most, a request for counsel at arraignment conveys the defendant's choice to have the assistance of "an expert in the law to guide him through hearings and trial, and the attendant complex legal matters that might arise". *Texas v. Cobb*, 532 U.S. 162, 177 (2001) (Kennedy, J., concurring). It says nothing about whether the defendant would choose to speak to police without counsel.

Ultimately, the *Jackson* rule is unnecessary because it provides no more protection than already provided by the *Edwards* rule. Where, as here, there is no indication that the defendant has chosen to communicate to police only through counsel, a police request for a waiver of the right to counsel at an interview is not coercive or "badgering." As a result, there is no need for a prophylactic rule such as the *Jackson* rule because there is no Sixth Amendment violation from the police-initiated interrogation. The *Jackson* rule should be abandoned.

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ARGUMENT

After giving several incriminating statements to police during custodial interrogations, Petitioner agreed to accompany the police to Lake Ponchartrain and show them where he threw the gun used to commit the murder. At the time police took Petitioner on the excursion to the lake, Petitioner had neither retained counsel nor requested counsel. However, he was appointed counsel earlier in the day at a hearing required by Louisiana law to be held within 72 hours of arrest. The Louisiana Supreme Court held that admission of a letter containing incriminating statements written by Petitioner during the excursion with police did not violate his Sixth Amendment right to counsel because Petitioner had not asserted his right to counsel at the time he signed the *Miranda* waiver form and agreed to the excursion.

The decision of the Louisiana Supreme Court does not alter the well-established rule that a criminal defendant's Sixth Amendment right to counsel attaches when the government initiates formal charges against him. Rather, the decision of the Louisiana Supreme Court simply applies this Court's prophylactic rule adopted in *Michigan v. Jackson*, 475 U.S. 625 (1986), that police may not obtain a waiver of the right to counsel and initiate an interview of a formally-charged defendant after the defendant has asserted his right to counsel. *See Michigan v. Harvey*, 494 U.S. 344, 352 (1990).

The *Jackson* rule is not intended to preclude a defendant whose right to counsel has attached from waiving his right to have counsel present during a police-initiated interview. In *Patterson v. Illinois*, 487 U.S. 285, 291 (1988), the Court held that a defendant whose right to counsel has attached may waive his right to counsel and agree to a police interview. Just as, under *Edwards v. Arizona*, 451 U.S. 477 (1981), police are precluded from conducting a custodial interview of a suspect once the suspect has asserted his right to have counsel present during the interview, police are precluded under *Jackson* and *Patterson* from initiating an interview of a defendant who has been formally charged once the defendant has asserted his right to counsel. *Patterson*, 487 U.S. at 635. Thus, the defendant's assertion of the right to counsel is a critical component of the *Jackson* rule. Indeed, in *Patterson*, the Court observed that the decision in *Jackson* "turned on the fact that the accused 'ha[d] asked for the help of a lawyer' in dealing with the police." *Patterson*, 487 U.S. at 291.

Jackson and *Patterson* make clear that police officers are not prohibited from questioning a defendant simply because the defendant's right to counsel has attached. Both decisions further clarify that police officers are not prohibited from questioning a defendant whose right to counsel has attached unless the defendant has asserted his right to counsel. Therefore, the question presented in this case is: what constitutes an assertion of the right sufficient to trigger the *Jackson* rule?

This Court's decisions firmly establish that only an affirmative assertion of the right to counsel, by an affirmative statement or action clearly indicating the defendant's choice to communicate with police only through counsel, is sufficient to trigger the *Jackson* rule. The requirement of an affirmative assertion of the right to counsel is clear from the plain language of the *Jackson* decision and the decision in *Patterson*, as well as *Jackson*'s roots in *Edwards v. Arizona*, 451 U.S. 477 (1981). An affirmative assertion also furthers the purposes of the *Jackson* rule, and reaches a proper balance of society's compelling interest in effective law enforcement and the defendant's Sixth Amendment right.

I. AN AFFIRMATIVE ASSERTION OF THE RIGHT TO COUNSEL IS NECESSARY TO TRIGGER APPLICATION OF THE *JACKSON* RULE.

A. Suspects are generally permitted to waive the right to counsel and voluntarily talk to police.

1. This Court has repeatedly recognized the importance of police questioning in effective law enforcement. In *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991), the Court refused to adopt a rule that would "seriously impede effective law enforcement" by precluding police from questioning any suspect on any topic once the suspect has been formally charged with a crime. Such a rule, the Court explained, would make "most persons in pretrial custody for serious offenses . . . unapproachable by police officers suspecting them of involvement in other crimes, *even though they have never expressed any unwillingness to be questioned*." *McNeil*, 501 U.S. at 181 (emphasis in original). "Since the ready ability to obtain uncoerced confessions is not an evil, but an unmitigated good, society would be the loser." *Id*. Voluntary statements are a "proper element in law enforcement", *Miranda v. Arizona*, 384 U.S. 436, 478 (1966), and are "essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 426 (1986); *see also Oregon v. Elstad*, 470 U.S. 298, 305 (1985) (far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable") (internal citation and quotation marks omitted); *Texas v. Cobb*, 532 U.S. 162, 172 (2001).

The Court has therefore long held that suspects may waive their Fifth Amendment right against self-incrimination and their Sixth Amendment right to counsel, so long as the waiver is knowing and voluntary. As the Court explained in *Moran*, "*Miranda* attempted to reconcile [the] opposing concerns" between effective law enforcement and coercive questioning "by giving the *defendant* the power to exert some control over the course of the interrogation." *Moran*, 475 U.S. at 426 (emphasis in original).

2. The Sixth Amendment right at issue here – the right to communicate with police only through counsel, if one so chooses – was first recognized in *Massiah v. United States*, 377 U.S. 201 (1964). In *Massiah*, the Court held that the police violate a defendant's Sixth Amendment right if they "deliberately elicit[ ]" information from him after he has already retained counsel. *Massiah*, 377 U.S. at 206. The Court did not address waiver in *Massiah* because, where, as there, police use an undercover informant, no waiver is possible. In *Brewer v.*

Williams, 430 U.S. 387 (1977), however, the Court specifically recognized that, even after a suspect has been formally charged and, as a result, his Sixth Amendment right has attached, he may waive his right to counsel. The Court in *Brewer* found that, in violation of *Massiah*, police had deliberately elicited information from the defendant after he had retained counsel and been formally charged. *Brewer*, 430 U.S. at 397-401. But the Court did not end its inquiry there. The Court assessed whether the defendant had waived his Sixth Amendment right when he responded to police questioning. *Id.* at 404-405. Finding that he did not, the Court recognized that a formally-charged defendant may waive his right to counsel, by "'an intentional relinquishment or abandonment'" of the right to counsel. *Brewer*, 430 U.S. at 404.

The Court has recognized the right of a formally-charged defendant to waive the right to counsel several times since *Brewer*. For example, in *Moran*, the Court held that "*absent a valid waiver*, the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches." *Moran*, 475 U.S. at 428 (emphasis added). Similarly, in *Patterson*, the Court held that a defendant who had been indicted, but who had not yet requested counsel or been appointed counsel, validly waived his right to counsel by signing a written waiver after receiving *Miranda* warnings. *Patterson*, 487 U.S. at 293.

In recognizing that a formally-charged defendant may waive the right to counsel, the Court honored a defendant's right to choose between having the assistance of counsel and not having the assistance of counsel in defending against the charges. The Court discussed this choice in *Maine v. Moulton*, 474 U.S. 159 (1985), where it held that the prosecution's use of the defendant's incriminating statements surreptitiously obtained by a co-defendant who was assisting the police violated the defendant's Sixth Amendment right. The Court explained, "Once the right to counsel has attached *and been asserted*, the State must of course honor it." *Moulton*, 474 U.S. at 170 (emphasis added). This means, the Court explained, that the State has "an obligation to respect and preserve the accused's choice to seek assistance of counsel." *Moulton*, 474 U.S. at 171. In *Moulton*, as in *Massiah* and *Brewer*, the defendant had retained counsel at the time of arraignment. *Moulton*, 474 U.S. at 162. The Court therefore found that, not only had the right to counsel attached, the defendant had made clear his choice to have counsel. That decision foreshadowed the Court's subsequent decision in *Michigan v. Jackson*.

B. The prophylactic *Jackson* rule, which overrides an otherwise valid waiver of the right to counsel, applies only where police initiate an interrogation after the defendant has affirmatively asserted the right to counsel.

In *Jackson*, the Court adopted the rule that, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police initiated interrogation is invalid." *Jackson*, 475 U.S. at 636. This rule "is based on the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations", and is designed to protect suspects from the use of overbearing or coercive tactics by police to obtain a waiver of the right to counsel. *Harvey*, 494 U.S. at 350. The *Jackson* rule is a prophylactic rule that is not itself a constitutional right, but protects a constitutional right. *See Harvey*, 494 U.S. at 353. Specifically, the *Jackson* rule is designed to protect a defendant's Sixth Amendment right to counsel in the same way the rule adopted in *Edwards v. Arizona*, 451 U.S. 477 (1981), is designed to protect a defendant's right against self-incrimination – by protecting the defendant's *choice* to communicate with police only through counsel.

The Court's holding in *Jackson* is consistent with its repeated recognition that a defendant whose right to counsel has attached may waive that right and police may rely on that waiver until the defendant asserts the right. If the defendant has affirmatively asserted the right by retaining counsel, as did the defendant in *Moulton*, or by requesting for counsel to be appointed, as did the defendant in *Jackson*, then police may not later seek a waiver of the right to counsel and conduct an interrogation. On the other hand, because a defendant who has not retained counsel, requested appointment of counsel, or otherwise asserted the right to counsel may waive the right to counsel, police may rely on a waiver of the right unless and until the defendant asserts the right.

Because it protects a formally-charged defendant's choice to have the assistance of counsel, the *Jackson* rule requires the defendant to make an affirmative assertion of the right to counsel in order to trigger the prophylaxis of precluding a police-initiated interrogation. This requirement is clear from (1) the plain language of the Court's decision in *Jackson* and subsequent decisions explicating the rule, (2) the clear purposes of the rule, (3) the rule's roots in the *Edwards* rule, and (4) the Court's analysis in *Patterson*.

1. The plain language of *Jackson* and later cases establishes the requirement of an affirmative assertion of the right to counsel.

The Court in *Jackson* repeatedly specified that its newly-created prophylactic rule applies to those cases where a defendant has "requested" or "asserted" counsel. For example, in a critical passage of the opinion, the Court explained why a general request for counsel at an arraignment should be construed as a request for counsel at a subsequent interrogation:

> Doubts must be resolved in favor of protecting the constitutional claim. This settled approach requires us to give a broad, rather than a narrow, interpretation to a defendant's *request* for counsel – we presume that the defendant *requests* the lawyer's services at every critical stage of the prosecution. We thus reject the State's suggestion that respondents' *requests* for the appointment of counsel should be construed to apply only to representation in formal proceedings.

Jackson, 475 U.S. at 633 (emphasis added).

Various other passages in the opinion repeat the need for a "request." *See, e.g., id.* at 633 n.7 ("We also agree with the comments of the Michigan Supreme Court about the nature of an accused's *request* for counsel. . . ."); *id.* at 634 (addressing the argument that "the police may not know of the defendant's *request* for attorney"); *id.* (a state actor "may not claim ignorance of defendants' unequivocal *request* for counsel to another state actor"); *id.* at 634-635 ("To the extent that there may have been any doubt about interpreting a *request* for counsel at an arraignment, or about a police responsibility to know of and respond to such a *request*, ... "); *id.* at 635 (written waivers "are insufficient to justify police-initiated interrogations after the *request* for counsel"); *id.* at 636 (concluding that "the need for additional safeguards [are] no less clear, when the *request* for counsel is made at an arraignment") (emphasis added).

Accordingly, the Court held that a defendant's waiver of the right to counsel during a police-initiated interrogation is invalid "if police initiate [the] interrogation after the defendant's *assertion*," of the right to counsel. *Id.* (emphasis added). *See also Jackson*, 475 U.S. at 640 (Rehnquist, J., dissenting) (emphasizing that the Court limited its holding to situations where the defendant has requested counsel, and "*not*" to "all police-initiated interrogations . . . from the moment the defendant's Sixth Amendment right to counsel attaches, with or without a request for counsel by the defendant.").

Later cases applying the *Jackson* rule have reiterated the assertion requirement expressly provided in *Jackson*. *See Patterson*, 487 U.S. at 291 (holding that *Jackson* rule did not apply because the defendant had not asserted his right to counsel before he waived the right by signing a *Miranda* waiver); *Harvey*, 494 U.S. at 350 ("the Court in *Jackson* concluded that the *Edwards* protections should apply when a suspect charged with a crime requests counsel outside the context of interrogation"); *McNeil*, 501 U.S. at 175 (recognizing that in *Jackson* the Court "held that once this right to counsel has attached and has been invoked, any subsequent waiver during a police initiated custodial interview is ineffective").

2. The requirement of an affirmative assertion of the defendant's choice to communicate with police only through counsel furthers the purposes of the *Jackson* rule.

The Court has noted at least two purposes of the *Jackson* rule: (1) deterring police from badgering defendants into waiving the right, *see Harvey*, 494 U.S. at 350; *McNeil*, 501 U.S. at 177, 180, and (2) balancing society's compelling interest in investigating, solving, and punishing criminal activity with defendants' rights to have counsel present during critical stages of a prosecution, including custodial interrogations, *see McNeil*, 501 U.S at 181. Both purposes are only served when the defendant affirmatively asserts his right to counsel. The rule should not, therefore, be extended beyond that situation.

a. The *Jackson* rule is premised on the supposition that "suspects who assert their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations." *Harvey*, 494 U.S. at 350. The rule presumes that a waiver of the right to counsel by a suspect who has asserted the right is the product of "badgering" and, therefore, is not truly voluntary. *See Harvey*, 494 U.S. at 350. Thus, the premise of the *Jackson* rule is that a request for counsel at arraignment constitutes a request for counsel "at every critical stage of the prosecution," including a subsequent custodial interrogation. *Jackson*, 475 U.S. at 633. To the extent that premise is valid at all (*but see* § II, *infra*), it is only valid where the defendant affirmatively asserted his choice to have the assistance of counsel.

Without an affirmative assertion of the right, there is no reason for police to believe that a formally-charged defendant who has not requested counsel or otherwise asserted his right to counsel is unwilling to voluntarily waive that right. This Court has repeatedly recognized that a defendant may waive his Sixth Amendment right to counsel. *See Brewer*, 430 U.S. at 404-405; *Moran*, 475 U.S. at 428; *Jackson*, 475 U.S. at 630; *Patterson*, 487 U.S. at 291. This is consistent with the defendant's right, recognized in *Faretta v. California*, 422 U.S. 806 (1975), to choose to forgo the assistance of counsel and represent himself. The Court has also recognized the State's burden to honor the defendant's choice. Although the Sixth Amendment is not violated when the State obtains "by luck or happenstance" an incriminating statement from a formally-charged defendant, the State may not **knowingly** circumvent the defendant's right to have counsel present during a police interview. *Moulton*, 474 U.S. at 176. However, the State knowingly circumvents a defendant's choice to have counsel only when it is aware of that choice. Thus, it is reasonable to require a defendant to provide notice of his choice, by way of an affirmative assertion of the right, before applying the *Jackson* rule to preclude police from obtaining a waiver of the right to counsel and initiating an interview.

Moreover, an affirmative assertion indicating the defendant's choice to communicate with police only through counsel provides a bright-line for police to follow. *See Jackson* 475 U.S. at 626 (noting that the *Edwards* rule is a bright-line rule designed to prevent police badgering). An affirmative assertion makes the defendant's choice clear to police, preventing further questioning and eliminating the risk of badgering.

b. Requiring an affirmative assertion also furthers society's interest in effective enforcement of criminal laws by allowing police to seek a waiver and initiate an interview until the defendant asserts the right to counsel. Prophylactic rules such as *Jackson* (and *Edwards* and *Miranda*) impose costs on society by preventing suspects from making intelligent and voluntary confessions. *See Minnick v. Mississippi*, 498 U.S. 146, 161 (1990) (Scalia, J., dissenting). They therefore must be limited to "those types of situations in which the concerns that powered the decision are implicated." *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984). The requirement of an affirmative assertion limits application of the *Jackson* rule to those cases where it is most likely that a waiver of the right to counsel may be the product of police badgering –

cases in which the defendant has indicated by his actions or his statements that his choice is, in fact, to have counsel's assistance.

3. As an extension of the *Edwards* rule, the *Jackson* rule includes the *Edwards'* requirement of an unambiguous assertion indicating the defendant's choice to speak to police only through counsel.

The *Edwards* rule, which precludes police-initiated interrogation after an uncharged suspect has asserted his right to counsel, requires an unambiguous statement indicating the suspect's desire to have counsel present during the interrogation. *Davis v. United States*, 512 U.S. 452, 459-460 (1994). *Jackson*'s grounding in the *Edwards* rule demands the same requirement for triggering the *Jackson* rule.

In adopting the *Jackson* rule, the Court reasoned that, if interrogation of a suspect not yet charged is precluded once the suspect has asserted the right to have counsel present, then interrogation of a formally-charged defendant should likewise be precluded. *Jackson*, 475 U.S. at 632. In *Harvey*, the Court acknowledged that the *Jackson* rule "is based on the Sixth Amendment, but its roots lie in this Court's decisions" in *Miranda* and *Edwards*. *Harvey*, 494 U.S. at 349-350. The Court explained that "*Jackson* simply superimposed the Fifth Amendment analysis of *Edwards* onto the Sixth Amendment right to counsel." *Harvey*, 494 U.S. at 350.

Twice, this Court has refused to treat the *Jackson* rule differently from the *Edwards* rule. First, in *Patterson*, the Court rejected the claim that the attachment of the right to counsel, without an assertion of the right, is sufficient to trigger the *Jackson* rule, and held that a formally-charged defendant who has not asserted the right to counsel may waive the right and agree to speak with police without counsel. *Patterson*, 487 U.S. at 290-291. Second, in *Harvey*, the Court rejected the claim that the attachment of the right to counsel is a sufficient basis for treating *Jackson* violations differently from *Edwards* violations, and held that statements obtained in violation of *Jackson* are admissible, just as statements obtained in violation of *Edwards* are admissible, to impeach the defendant at trial. *Harvey*, 494 U.S. at 350-353. In *Harvey*, the Court explained that the attachment of the Sixth Amendment right is not a basis for treating *Jackson* violations differently from *Edwards* violations because, otherwise, formally-charged defendants who have obtained counsel would be barred from waiving their right to counsel. Rejecting such a result, the Court stated, "To hold that a defendant is inherently incapable of relinquishing his right to counsel once it is invoked would be 'to imprison a man in his privileges and call it the Constitution.'" *Harvey*, 494 U.S. at 353, quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942). *See also Harvey*, 494 U.S. at 352-353, citing *Brewer*, 430 U.S. at 405-406 (recognizing a formally-charged defendant's ability to waive his Sixth Amendment right).

Just as in *Patterson* and *Harvey,* in this case there is no reason to apply the *Jackson* rule differently from the *Edwards* rule. The *Edwards* rule requires an unambiguous assertion of the right that unequivocally articulates the defendant's desire to have counsel present during the interrogation. *Davis*, 512 U.S. at 459-460. Without such a requirement, the *Edwards* rule "'would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity.'" *Id.*, quoting *Michigan v. Mosley*, 423 U.S. 96, 102 (1975). The purpose of the prophylactic rule of *Edwards* is not to create "permanent immunity from further interrogation, regardless of the circumstances". *Mosley*, 423 U.S. at 102.

Likewise, the purpose of the prophylactic rule of *Jackson* is not to prevent formally-charged defendants from making voluntary statements to police. Like the *Edwards* rule, the *Jackson* rule is designed to respect the defendant's choice to communicate with police only though counsel. Therefore, the assertion required under the *Jackson* rule also must be an unambiguous indication of the defendant's desire to have counsel present during an interrogation. Anything less fails to strike the balance, struck in *Edwards*, between society's compelling interest in effective law enforcement and the defendant's right to counsel. *See Moran*, 475 U.S. at 426 (discussing the "subtle balance" struck in *Miranda*).

4. The Court's decision in *Patterson* confirms that *Jackson* requires an affirmative assertion unambiguously indicating the defendant's choice to communicate with police only through counsel.

In *Patterson*, the Court found the defendant's waiver valid because he had not requested, retained or accepted appointment of counsel and the *Miranda* waiver forms were sufficient to establish that the waiver of the right to counsel was knowing and intelligent. *Patterson*, 487 U.S. at 291, 295-296. In so holding, the Court rejected the defendant's claim that police are barred from initiating an interview of a defendant after the defendant's right to counsel has attached by the filing of the indictment. *Patterson*, 487 U.S. at 291. The Court noted that the defendant "at no time sought to exercise his right to have counsel present", in contrast to the defendant in *Jackson*, who "'ha[d] asked for the help of a lawyer' in dealing with the police." *Patterson*, 487 U.S. at 291, quoting *Jackson*, 475 U.S. at 631. Indeed, the Court noted that the decision in *Jackson* turned on the fact that the defendant had asked for counsel.

Petitioner proposes a rule in this case that has the same effect as the rule rejected in *Patterson*. In *Patterson*, the defendant proposed a rule that police may never request a waiver of the right to counsel from a defendant whose right to counsel has attached. *Patterson*, 487 U.S. at 290. That proposed rule effectively eliminated the requirement, consistently recognized by the Court since *Brewer*, that the defendant must assert his right to counsel to preclude the police from seeking a waiver of the right to counsel and initiating an interview. Similarly, Petitioner proposes a rule that would preclude police from seeking a waiver and initiating an interview of a formally-charged defendant who has been appointed counsel regardless of whether the defendant either requested or accepted the appointment. Petitioner's proposed rule, like the proposed rule rejected in *Patterson*, would eliminate the requirement of an assertion of the right.

This Court rejected the proposed rule in *Patterson* on two grounds. First, the Court recognized that the purpose of the prophylactic rule adopted in *Jackson* is not to bar an accused from making a knowing and intelligent waiver of his right to counsel and agreeing to a police interview without counsel. Rather, the purpose of the rule is to preserve "the integrity of an accused's choice to communicate with police only through counsel". *Patterson*, 487 U.S. at 291. Thus, the requirement of an assertion of the right is a critical component of the *Jackson* rule as an indicator of the defendant's choice.

Second, the Court determined that the Sixth Amendment right to counsel is adequately protected by the requirement that a waiver of the right, for purposes of answering questions by police, must be voluntarily, knowingly and intelligently given. *Patterson*, 487 U.S. at 296. In so holding, the Court rejected the claim that a *Miranda* waiver cannot be sufficient protection of the Sixth Amendment right because the Sixth Amendment right to counsel is superior to the Fifth Amendment right to counsel. *Patterson*, 487 U.S. at 297-298. Accordingly, the Sixth Amendment right does not require a more stringent prophylactic rule – one that does not include the requirement of an assertion of the right – to protect against police overreaching in obtaining a waiver and initiating an interview than is required under the Fifth Amendment.

C. Petitioner's claim that an affirmative assertion of the right to counsel is not required to trigger the *Jackson* rule is unsupported by the Court's decisions.

Apparently recognizing that the Court has consistently required an assertion of the right to trigger the *Jackson* rule, Petitioner argues that the Court's prior decisions suggest, not only that an *affirmative* assertion of the right is not necessary, but also that appointment of counsel is sufficient to indicate the defendant's assertion of the right to counsel. Pet.Br. at pp. 24-25. To the contrary, this Court has never held that an appointment of counsel that was neither requested nor accepted by the defendant constitutes the defendant's assertion of the right to counsel. In *Massiah* and *Brewer*, as well as *Moulton*, the defendants appeared in court with counsel they had retained. *Massiah*, 377 U.S. at 202; *Brewer*, 430 U.S. at 405; *Moulton*, 474 U.S. at 162. As the Court recognized in *Brewer*, the act of retaining counsel is a clear indication of the defendant's choice to have counsel act as a medium between him and the State and, thus, is an affirmative assertion of the right to counsel. *See Brewer*, 430 U.S. at 405. In *Jackson*, the defendant requested at arraignment that counsel be appointed to represent him. *Jackson*, 475 U.S. at 625. As noted above, the Court emphasized that fact as the critical difference between *Jackson* and *Patterson*. *See Patterson*, 487 U.S. at 291.

Relying on a footnote in *Patterson*, Petitioner argues that formally-charged defendants who have not requested counsel but nevertheless have been appointed counsel should be treated the same as formally-charged defendants who retain their own counsel. Pet.Br. at p. 24, citing *Patterson*, 487 U.S. at 290 n.3. In footnote three in *Patterson*, the Court noted that the defendant had neither retained counsel nor accepted appointment of counsel. *Patterson*, 487 U.S. at 290 n.3. The Court then stated, "Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." *Id*. It is this statement on which Petitioner relies.

Petitioner's reliance is misplaced. The Court did not explain what "distinct set of constitutional safeguards" apply differently once a formally-charged defendant has counsel. Instead, the Court cited to *Moulton*. *Patterson*, 487 U.S. at 290 n.3. In *Moulton*, the Court did not create a distinct rule for shielding a formally-charged defendant who has counsel from police-initiated interrogation. Rather, the Court recognized the duty of the State to honor a defendant's choice to have counsel act as a medium between him and the State in defending against criminal charges. *Moulton*, 474 U.S. at 170-171. The Court clearly held that that duty is triggered once the right to counsel has attached and been asserted. *Id.* Thus, the significance of the existence of an attorney-client relationship noted in footnote three in *Patterson* is that the existence of the relationship is the result of the defendant's express choice to have the assistance of counsel.

Petitioner also relies on a similar statement by the Court in *Harvey*, that "'once a defendant *obtains* or even requests counsel . . . analysis of the waiver issue changes' and *Jackson* applies." Pet.Br. at p. 25, quoting *Harvey*, 494 U.S. at 346 (emphasis added by Petitioner). According to Petitioner, that statement indicates that the existence of the attorney-client relationship triggers the *Jackson* rule. However, Petitioner fails to complete the Court's statement. Immediately following the statement quoted by Petitioner the Court explained, "But that change is due to the protective rule we created in *Jackson* based on the apparent inconsistency between *a request for counsel* and a later voluntary decision to proceed without assistance." *Harvey*, 494 U.S. at 352 (emphasis added). Again, as in *Patterson*, the significance of the fact that counsel has been "obtained" is that counsel has been obtained by the affirmative actions of the defendant and, thus, indicates the defendant's express choice to have the assistance of counsel.

Petitioner further claims that the existence of an attorney-client relationship should be the triggering event for application of the *Jackson* rule. But *Moran* rejected that claim. *Moran*, 475 U.S. at 430-431 ("As a practical matter, it makes little sense to say that the Sixth Amendment right to counsel attaches at different times depending on the fortuity of whether the suspect or his family happens to have retained counsel prior to interrogation."). Moreover, Petitioner's claim ignores that the *Jackson* rule is rooted in the *Edwards* rule, the purpose of which is to preclude, as a prophylactic measure, police from badgering a defendant into waiving his right to counsel and talking to police without counsel. *See Harvey*, 494 U.S. at 350. Central to both *Edwards* and *Jackson* is the principle that a defendant must choose whether to waive his right to counsel and speak to police without the assistance of counsel. *See Patterson*, 487 U.S. at 291 (purpose of *Edwards* and *Jackson* is to preserve the integrity of the defendant's choice to communicate with police through counsel). The existence of an attorney-client relationship forced on a defendant by the State, in the absence of the defendant's express request for counsel or express acceptance of counsel, says nothing about the defendant's choice. As this case demonstrates, it is entirely possible for a defendant to have counsel appointed without ever having made the choice to communicate with police only through counsel.

Thus, to the extent the existence of an attorney-client relationship is relevant to the *Jackson* rule, such a relationship does not exist by the mere appointment of counsel. Until he or she accepts the appointment of counsel, there can be no attorney-client relationship between the defendant and appointed counsel. Even if acquiescence in the appointment is sufficient to establish acceptance for general purposes of having the assistance of counsel in defending against the charges, for the specific purpose of indicating the choice to communicate to police only through counsel, mere acquiescence in the appointment of counsel is insufficient. To be an adequate assertion of the right to trigger the *Jackson* rule, acquiescence in the appointment should be shown *at least* by some action by the defendant, such as cooperating with the appointed counsel or appearing in court with counsel. Without such action, mere appointment of counsel by the State says nothing about the defendant's decision to communicate with the police only through appointed counsel, but only speaks to the State's decision to appoint counsel even without a request from the defendant.

Moreover, contrary to Petitioner's suggestion (Pet.Br. at pp. 22-23), a rule that requires an express acceptance of appointed counsel does not eliminate the defendant's right to counsel. A formally-charged defendant is entitled to the assistance of counsel, regardless of whether he has retained counsel, requested counsel, or been appointed counsel. The *Jackson* rule does not affect that principle because the purpose of the *Jackson* rule is to preserve the integrity of the defendant's choice to communicate with police through counsel, not to bar a defendant from waiving his right to counsel. *See Patterson*, 487 U.S. at 291. In other words, the purpose of the *Jackson* rule is "to help guarantee that waivers are truly voluntary." *Harvey*, 494 U.S. at 349. A defendant who has an attorney, whether retained or appointed, may reasonably and voluntarily decide to communicate with police without counsel. As Justice Kennedy explained in his concurring opinion in *Cobb*, "It is quite unremarkable" that a defendant would want the assistance of counsel "to guide him through hearings and trial" but also "choose to give on his own a forthright account of the events that occurred." *Cobb*, 532 U.S. at 177 (Kennedy, J., concurring). The *Jackson* rule does not prohibit such a choice, but protects the defendant's ability to make that choice while ensuring that the choice will not be the result of police coercion.

II. THE *JACKSON* RULE SHOULD BE MODIFIED TO APPLY ONLY "WHERE A SUSPECT HAS MADE A CLEAR AND UNAMBIGUOUS ASSERTION OF THE RIGHT NOT TO SPEAK OUTSIDE THE PRESENCE OF COUNSEL".

As shown in Section I, the *Jackson* prophylactic rule is designed to protect a defendant's choice to have the assistance of counsel, a choice that must be manifested by an affirmative assertion or request. The rule's premise is that a formally-charged defendant's request to be represented by counsel reflects the choice to communicate with police only through counsel. *See Jackson*, 475 U.S. at 633. From the day the decision was announced, however, *Jackson's* critics have questioned the correctness of that premise. Certainly, a defendant who requests counsel during a post-arraignment interrogation has made the choice to communicate with police only through counsel. But it is far from obvious that, absent such a request, a defendant who has retained or requested counsel has made that same choice. For this reason, Justice Kennedy observed that the *Jackson* rule makes sense only where the defendant "has made a clear and unambiguous assertion of the right not to speak outside the presence of counsel, the same clear election required under *Edwards*." *Cobb*, 532 U.S. at 176 (Kennedy, J., concurring, Justices Scalia and Thomas, joining). *Amici* agree and ask the Court to reconsider *Jackson*.

1. The dissent in *Jackson* criticized the Court's decision as an illogical extension of the *Edwards* rule. *Jackson*, 475 U.S. at 637-642. (Rehnquist, J., dissenting). The *Edwards* rule, the dissent noted, "does not arise until affirmatively invoked by the defendant during custodial interrogation." *Id.* at 641. In contrast, the *Jackson* rule is not tied to a request for counsel during a custodial interrogation. Rather, it is triggered by "the otherwise legally insignificant request for counsel" at arraignment. *Id.* at 642. The dissent criticized the decision for providing "no satisfactory explanation for its decision to extend the *Edwards* rule to the Sixth Amendment," while limiting "that rule to those defendants foresighted enough, or just plain lucky enough, to have made an explicit request for counsel" which is "completely unnecessary for Sixth Amendment purposes." *Id.* The Court in *McNeil* similarly viewed the *Jackson* rule as based on the premise that the "invocation of the Sixth Amendment right to counsel" at arraignment constitutes a "request for the assistance of counsel in custodial interrogation." *McNeil*, 501 U.S. at 179.

The wisdom of the *Jackson* rule depends on the validity of that premise. Yet there is serious reason to question its validity. As Justice Kennedy stated:

> [T]he acceptance of counsel at arraignment or similar proceeding only begs the question: acceptance of counsel for what? It is quite unremarkable that a suspect might want the assistance of an expert in the law to guide him through hearings and trial, and the attendant complex legal matters that might arise, but nonetheless might choose to give on his own a forthright account of the events that occurred. A court-made rule that prevents a suspect from even making this choice serves little purpose, especially given the regime of *Miranda* and *Edwards*.

Cobb, 532 U.S. at 177 (Kennedy, J., concurring).

Of course, if the Constitution itself mandates the *Jackson* rule, the rule's practical effect would be irrelevant. But *Jackson* is "not compelled directly by the Constitution". *Harvey*, 494 U.S. at 351-352. Rather, *Jackson* establishes a prophylactic rule "designed to ensure voluntary, knowing, and intelligent waivers of the Sixth Amendment right to counsel." *Id.* at 351. A prophylactic rule must be limited to its stated objectives so that it strikes a balance between those objectives and societal interests. *See United States v. Patane*, 542 U.S. 630, 639 (2004) (extension of a prophylactic rule designed to protect the privilege against self-incrimination "must be justified by its necessity for the protection of the actual right"); *Minnick v. Mississippi*, 498 U.S. at 161 (Scalia, J., dissenting) ("The value of any prophylactic rule (assuming the authority to adopt a prophylactic rule) must be assessed, not only on the basis of what is granted, but also on the basis of what is lost."). Therefore, the Court "ought to question the wisdom of a judge-made preventative rule to protect a suspect's desire not to speak when it cannot be shown that he had that intent." *Cobb*, 532 U.S. at 176 (Kennedy, J., concurring).

Moreover, *Jackson*'s extension of *Edwards* cannot be justified on the ground that post-arraignment custodial interrogations deserve heightened protection compared to pre-arraignment interrogations. In *Patterson*, the Court explained that it has "defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." *Patterson*, 487 U.S. at 298. Applying this approach, the Court concluded that "[t]he State's decision to . . . commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose that an attorney serves when the accused is questioned by authorities." *Id.* at 298-299.

Nor can the *Jackson* rule be justified as a rule that protects against police routinely badgering defendants into waiving their right to counsel, one justification offered by the Court for adopting the *Jackson* prophylactic rule. Criticizing that justification, the *Jackson* dissent observed, "[t]he Court does not even suggest that the police commonly deny defendants their Sixth Amendment right to counsel" and it is unlikely that "such a claim [would] be borne out by empirical evidence." *Jackson*, 475 U.S. at 625 (Rehnquist, J., dissenting). In other words, it is unlikely that the evil targeted by the *Jackson* rule rises to the level sufficient to justify the prophylactic rule. *See Hudson v. Michigan*, 547 U.S. 586, 599 (2006) ("we now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously"; factors such as "education, training, and supervision of police officers," the deterrent effect of liability under 42 U.S.C. § 1983, and the professionalism of "modern police forces" reduce the risk of constitutional violations by police.).

2. In the end, the *Jackson* rule is unnecessary. As discussed above, the rule was created to protect formally-charged defendants from being coerced into waiving their right to counsel during police-initiated interrogations. A defendant, however, is *already* protected against the use of such tactics: that protection is provided by *Miranda* and *Edwards*. At all times before and after the initiation of adversarial proceedings, a police-initiated custodial interrogation (1) must be preceded by *Miranda* warnings and a *Miranda* waiver, and (2) must terminate if the defendant rescinds the waiver and requests counsel. Under *Edwards*, the defendant is always protected from being badgered by police into withdrawing a previous request for counsel during a custodial interrogation.

Accordingly, as Justice Kennedy concluded, the *Jackson* rule should "apply only where a suspect has made a clear and unambiguous assertion of the right not to speak outside the presence of counsel, the same clear election required under *Edwards*." *Cobb*, 532 U.S. at 176 (Kennedy, J., concurring). To the extent the *Jackson* rule appears to provide additional protection beyond that provided by the *Edwards* rule, it should be abandoned.

◆

CONCLUSION

This Court should affirm the decision of the Louisiana Supreme Court.

Respectfully submitted,

GARY K. KING
Attorney General of New Mexico

M. VICTORIA WILSON
Assistant Attorney General
Counsel of Record
111 Lomas Blvd. N.W.
Albuquerque, New Mexico 87102
(505) 222-9052

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Supreme Court, U.S.
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William K. Suter,
Clerk

No. 07-1529

IN THE
Supreme Court of the United States

JESSE JAY MONTEJO,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

**On Writ of Certiorari to the
Supreme Court of Louisiana**

PETITIONER'S MOTION FOR REARGUMENT

JELPI P. PICOU
G. BEN COHEN
ROBERT J. SMITH
THE CAPITAL APPEALS
PROJECT
636 BARONNE STREET
NEW ORLEANS, LA 70113
(504) 529-5955

PAUL M. SMITH
Counsel of Record
WILLIAM M. HOHENGARTEN
MATTHEW S. HELLMAN
ADAM G. UNIKOWSKY*
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001
(202) 639-6000

*Not admitted in DC;
supervised by principals of
the firm

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INTRODUCTION

Petitioner Montejo respectfully asks this Court to order reargument in the above-captioned matter in light of the Court's March 27, 2009 Order requesting supplemental briefing on whether *Michigan v. Jackson* should be overturned.

DISCUSSION

1. Reargument is appropriate in this case to address the significant question of whether *Michigan v. Jackson* should be overturned. As the case came to the Court initially, the focus of the parties' argument was almost entirely concerned with whether the decision below complied with *Jackson*, rather than whether *Jackson* itself should be overruled in the first instance. Neither party discussed the merits of overruling *Jackson* in its opening brief, and Petitioner addressed the point only briefly in its reply brief in response to a short argument advanced by State *amici*. Consequently, at oral argument the question of whether *Jackson* should be overruled was touched upon only briefly. The topic did not come up at all during Respondent's argument, and was the subject of only a few questions during Petitioner's argument.

2. Now that the Court has indicated a specific interest in the question of whether *Jackson* should be overruled, reargument is appropriate to allow the issue to be addressed fully. The parties' supplemental briefs have raised new, significant, and complex arguments about *Jackson's* rationale and the consequences of overturning the decision both for Sixth Amendment jurisprudence generally, and for this case in particular. The numerous *amici* in support of both parties who have

responded to the Court's invitation to submit supplemental briefs further attests to the importance of these issues. If *Jackson's* validity is to be important to the resolution of this case, reargument should be granted to allow full consideration of these newly-raised issues.

3. Counsel for the parties have conferred regarding this motion. Counsel for Respondent asked that this motion not include any representation as to their position on the motion.

4. Counsel asks that the Court set reargument either for a date during the April 2009 sitting, or for a date during October Term 2009.

Respectfully submitted,

JELPI P. PICOU G. BEN COHEN ROBERT J. SMITH THE CAPITAL APPEALS PROJECT 636 BARONNE STREET NEW ORLEANS, LA 70113 (504) 529-5955	PAUL M. SMITH *Counsel of Record* WILLIAM M. HOHENGARTEN MATTHEW S. HELLMAN ADAM G. UNIKOWSKY* JENNER & BLOCK LLP 1099 New York Ave., N.W. Suite 900 Washington, DC 20001 (202) 639-6000

*Not admitted in DC; supervised by principals of the firm

April 15, 2009

SUPPLEMENTAL
BRIEF

125 (17)

No. 07-1529

Supreme Court, U.S.
FILED
APR 14 2009
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

JESSE JAY MONTEJO,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

OPENING SUPPLEMENTAL BRIEF FOR PETITIONER

JELPI P. PICOU
G. BEN COHEN
ROBERT J. SMITH
THE CAPITAL APPEALS PROJECT
636 BARONNE STREET
NEW ORLEANS, LA 70113
(504) 529-5955

PAUL M. SMITH
Counsel of Record
WILLIAM M. HOHENGARTEN
MATTHEW S. HELLMAN
ADAM G. UNIKOWSKY*
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001
(202) 639-6000

*Not admitted in DC; supervised by principals of the firm

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INTRODUCTION

This Court should not overrule *Michigan v. Jackson*, 475 U.S. 625 (1986). For more than 70 years this Court has recognized that a person facing a criminal prosecution "requires the guiding hand of counsel at *every* step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (emphasis added). *Jackson* safeguards the Sixth Amendment's entitlement to the "guiding hand of counsel" by barring the police from bypassing a defendant's attorney and interrogating the defendant after the right to counsel has attached. The defendant who is not allowed to rely on his counsel in deciding whether to accede to police questioning has not received the protection of the Sixth Amendment, regardless whether his decision could be considered coerced under the Fifth Amendment. To hold otherwise would both run afoul of this Court's many cases finding that the Sixth Amendment protects an interest distinct from the Fifth, and replace *Jackson*'s bright-line rule with a voluntariness standard that would be far harder to administer.

Stare decisis also counsels strongly against disturbing this decades-old constitutional precedent. To the extent there are concerns that *Jackson* interferes with a defendant's free will, this is not the case to redress those concerns. In this case, there is no plausible reading of the Sixth Amendment that would make Montejo's statements admissible. With or without *Jackson*, this Court should not endorse a regime in which the police may secure adversarial advantage by circumventing the role of defense counsel. *See Missouri v. Seibert*, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring in the judgment).

ARGUMENT

I. *Jackson* Best Protects The Distinct Interests Of The Sixth Amendment.

This Court has repeatedly observed the distinct protection the Sixth Amendment guarantees a defendant who has been charged with a crime: the right "to rely on counsel as a 'medium' between him and the State." *Maine v. Moulton*, 474 U.S. 159, 176 (1985). The *Jackson* rule represents a narrow, but important application of that principle: once the Sixth Amendment right to counsel has attached, and the defendant has counsel (or has requested counsel), the State may not circumvent the lawyer to initiate interrogation of the defendant.

As this case came to the Court, a minority of states as *amici curiae* contended that *Jackson* is unnecessary in light of the Fifth Amendment protections provided by *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981). That argument fundamentally misconceives the Sixth Amendment underpinnings of the *Jackson* rule and the distinct Sixth Amendment interests it protects.

Miranda and *Edwards* do not render *Jackson* redundant because they safeguard an entirely different constitutional guarantee. The Fifth Amendment does not guarantee the right to counsel as such; it prohibits the state from compelling self-incrimination or coercing confessions. Thus, the defendant's right to request counsel during custodial interrogations under Fifth Amendment cases like *Miranda* and *Edwards* serves the purely instrumental role of ensuring that confessions are voluntary. *See, e.g., Colorado v. Spring,* 479 U.S. 564, 572-73 (1987). This Fifth Amendment rule and cases decided under it are not concerned with protecting any right to counsel apart from that instrumental purpose.

In sharp contrast, the right to counsel is not an instrumental tool to enforce the Sixth Amendment. It *is* the Sixth Amendment. Rather than being one among many tools to prevent coerced confessions, the Sixth Amendment guarantees a defendant the distinct right "to rely on counsel as a 'medium' between him and the State." *Moulton,* 474 U.S. at 176. Unlike the Fifth Amendment, which applies to custodial interrogations whenever they may occur, the Sixth Amendment right is a temporally limited one that "becomes applicable only when [a prosecution begins and] the government's role shifts from investigation to accusation." *Moran v. Burbine,* 475 U.S. 412, 430 (1986). And unlike the Fifth Amendment, which applies to interrogations pertaining to any crime, the right to counsel is offense-specific, and applies only to those charges the government has taken steps to prosecute. *McNeil v. Wisconsin,* 501 U.S. 171, 178-79 (1991). These limitations on the right to counsel are tailored to its purpose "to protec[t] the unaided layman at critical confrontations with his expert adversary, the government, after [their] adverse positions ... have solidified with respect to a particular alleged crime." *Id.* at 177-78 (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)) (alteration in original, internal quotation marks omitted).

Because the Fifth and Sixth Amendments serve different purposes, it is category error to conclude that a Fifth Amendment *Miranda-Edwards* regime could substitute for the Sixth Amendment right to the assistance of counsel that *Jackson* safeguards. *Miranda-Edwards* would allow the State to bypass a defendant's lawyer and obtain an uncounseled waiver of the Sixth Amendment right to counsel directly from the defendant even after he has been formally charged through judicial process and the State stands in an adversarial position to him as his accuser. While such a "waiver," and any subsequent statements, might not be coerced within the meaning of the Fifth Amendment, that process would deprive the "unaided layman" of having his counsel act as his intermediary during a "critical confrontation" with the prosecution. Contrary to the Sixth Amendment's very purpose of ensuring the defendant is able to obtain the advice of counsel, the defendant would be required to make an *uncounseled* decision whether to talk to the police. The Sixth Amendment would mean little if the State could act in this way to "circumvent[] and thereby dilute[] the protection afforded by the right to counsel." *Moulton*, 474 U.S. at 171.

This Court has recognized the importance of counsel's advisory role under the Sixth Amendment for more than 70 years. In *Powell*, it observed that a person haled into court on criminal charges "requires the guiding hand of counsel at *every* step in the proceedings against him." 287 U.S. at 69 (emphasis added); *see also id.* at 57 (noting that "during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense"); *Hamilton v. Alabama*, 368 U.S. 52, 54-55 (1961) ("The guiding hand of counsel is needed prior to trial lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed." (internal quotation marks omitted)); *White v. Maryland*, 373 U.S. 59 (1973) (Sixth Amendment protects a defendant's interactions with the authorities in post-charge, pre-trial setting).

Justice Stewart therefore was on firm ground when, in writing for the Court in *Massiah v. United States*, 377 U.S. 201, 205 (1964), he referred back to *Powell* in endorsing the rule that "the Constitution required reversal of the conviction" where a

> confession had been deliberately elicited by the police after the defendant had been indicted, and therefore at a time when he was clearly entitled to a lawyer's help. . . . [U]nder our system of justice the most elemental concepts of due process of law contemplate that an indictment be followed by a trial, in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law. . . . [A] Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under

> interrogation by the police in a completely extrajudicial proceeding. Anything less . . . might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him."

Id. at 204 (internal quotation marks omitted).

The Court's longstanding commitment to protecting the right to counsel in pretrial phases of prosecutions does not reflect concerns about compelled self-incrimination, but rather about the fairness of adversarial process. As a result, this Court has repeatedly found, both before and after *Jackson*, that confessions that were not coerced within the meaning of the Fifth Amendment would nevertheless be inadmissible because they were acquired in violation of the Sixth Amendment.

Moran v. Burbine, 475 U.S. 412 (1986), issued less than a month before *Jackson*, is illustrative. In *Moran*, the police gave the defendant a *Miranda* warning and obtained an inculpatory statement without telling him that his counsel was trying to reach him.

The Court held that the statements were admissible under the Fifth Amendment: "Once it is determined that a suspect's decision not to rely on his rights was *uncoerced*, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete." 475 U.S. at 422-23 (emphasis added). But the Court unanimously agreed that had the defendant's Sixth Amendment right attached, the questioning would not have been allowed, even with a *Miranda* waiver: "we readily agree that once the right *has* attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a "'medium' between the suspect and the State" during the interrogation." *Id.* at 428 (internal quotation marks and alterations omitted).

Several other cases reinforce this point in the context of voluntary statements made to police informants. In *United States v. Henry*, 447 U.S. 264 (1980), the Court concluded that a defendant's post-indictment statements to a paid jailhouse informant were elicited in violation of the Sixth Amendment. The Court reasoned that although "the Fifth Amendment has been held not to be implicated by the use of undercover Government agents before charges are filed because of the absence of the potential for compulsion[,] ... those cases are not relevant to the inquiry under the Sixth Amendment here whether the Government has interfered with the right to counsel of the accused." *Id.* at 272.[1] *See*

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[1] This Court has further recognized that, where it applies, the right to assistance of counsel is the right that gives teeth to other rights, including Fifth Amendment rights. *See Estelle v. Smith*, 451 U.S. 454, 471 (1981) (noting that subsequent to initiation of prosecution, a defendant should not be forced to make a determination concerning whether to assert a Fifth Amendment privilege without the "guiding hand of counsel", as the determination "depends upon legal advice from someone who is trained and skilled in the subject matter" and "requires a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of

also Moulton, 474 U.S. at 180 (drawing same distinction in context of informant outside of jail). In these cases, it was clear that the defendant's statements were voluntary (indeed, they were not even custodial statements), and equally clear that they were barred by the Sixth Amendment.

Most recently, in *Fellers v. United States*, 540 U.S. 519 (2004), the Court unanimously reaffirmed that post-indictment statements made during a noncustodial interrogation violated the Sixth Amendment, even though they would be admissible under the Fifth Amendment. Citing *Michigan v. Jackson*, the Court noted that "we have expressly distinguished [the Sixth Amendment] standard from the Fifth Amendment custodial-interrogation standard." *Id.* at 524.

The *Jackson* rule also accommodates practical reality. Thus, *Jackson*'s protections do not arise unless and until the defendant "has a lawyer" or "requests the assistance of counsel." *Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988). That limitation is sensible, given that until that point there is no counsel (or imminent counsel in the case of a request) for the defendant to "rely on," or through whom the police can communicate. Nor does *Jackson* bar the defendant from approaching the police on his own to make a statement. Such a statement by definition does not stem from police interference with the defendant's right to rely on

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possible alternative strategies at the sentencing hearing.") (alteration in original; internal quotation marks omitted).

counsel. *Cf. Fellers*, 540 U.S. at 523 ("We have held that an accused is denied 'the basic protections' of the Sixth Amendment 'when there [is] used against him at his trial evidence of his own incriminating words, which federal agents . . . deliberately elicited from him after he had been indicted and in the absence of his counsel'') (citation omitted).

This case strikes at the core of the Sixth Amendment interests properly protected by *Jackson*. Montejo faced a charge of capital murder and had been appointed counsel with whom he never even had the chance to consult. Even leaving aside the fact that the police falsely told Montejo that he lacked an attorney when they sought his waiver, *see infra*, it was a violation of the Sixth Amendment for the police to seek his uncounseled waiver in the first place. That Montejo signed a *Miranda* waiver does not overcome the ultimate fact: the State "interfered with the right to counsel of the accused by deliberately eliciting incriminating statements." *Henry*, 447 U.S. at 272.

II. Overruling *Jackson* Would Create Significant Practical And Doctrinal Difficulties.

Jackson not only properly safeguards the Sixth Amendment's right to counsel, but also has the virtue of being an easily administered bright-line rule. In contrast, replacing *Jackson* with a *Miranda-Edwards* regime would create a host of difficulties that would cloud the Sixth Amendment for years to come, as well as create undesirable incentives for the police.

First, if *Jackson* is overruled, it will lead to innumerable questions about when a defendant has made a sufficiently precise request for counsel vis-a-vis an interrogation. In addition to questions surrounding post-appointment interrogations generally, confusion is bound to arise from the very process by which counsel is appointed. In most jurisdictions, the appointment process takes place through a colloquy with the defendant. Whether a defendant makes an unambiguous request for counsel to assist with interrogations at the time of appointment will depend upon such factors as whether the defendant accepts counsel in a jurisdiction that informs him that he has the right to assistance of counsel at all stages of a prosecution, or says upon acceptance that he does not want to talk to the police. The *Edwards* analysis would vary upon such formalities as whether a jurisdiction requires a defendant to request counsel, or provides counsel to indigent defendants without request, or indeed whether the defendant is given a chance to speak at all at the hearing. The analysis will be further complicated in the many cases (including this one) where there is no transcript of the hearing.[2]

Indeed, adopting an *Edwards* rule after counsel has been appointed or requested will put the courts in exactly the position that the Louisiana Supreme Court believed itself to be in this case: attempting to determine whether the defendant had sufficiently invoked his right to counsel on the basis of an untranscribed hearing. Under *Edwards*, Montejo's silent assent to appointment of counsel might not suffice, whereas procedures in other states that require a defendant to affirmatively request counsel or verbalize assent to appointment would. The important interests protected by the Sixth Amendment should not turn on such formalities, particularly where uncounseled defendants have no understanding of their significance.

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[2] See Transcript of Oral Argument at 36:24-37:1 ("JUSTICE STEVENS: Louisiana does not does not provide a transcript of all these hearings, does it? MS. LANDRY: No, Your Honor.").

Second, replacing *Jackson* with *Miranda-Edwards* will require the courts to develop adequate waiver language to deal with the particular context of the Sixth Amendment. For the defendant who has already obtained counsel, the traditional *Miranda* warning ("You have the right to counsel. If you cannot afford counsel, counsel will be appointed for you.") is not merely insufficient; it is affirmatively misleading. It implies that the defendant does not have counsel when he does.[3] And it does not make clear to the defendant who has obtained counsel what more he has to do to invoke his Sixth Amendment rights.[4]

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[3] *Patterson*, in contrast, held that a *Miranda* warning is sufficient to inform a defendant of his post-attachment rights in a completely different situation: where he "had not retained, or accepted by appointment, a lawyer [or] even request[ed]" one. 487 U.S. at 290 n.3. Consequently, the confusion that *Miranda* creates for a counseled defendant was not at issue in *Patterson*.

[4] The fact that *Miranda-Edwards* applies only to custodial interrogations may cause further confusion. Under *Jackson*, the police may not show up at the home of a

Proper waiver language concerning interrogations will be only the beginning of the problem because pre-trial post-attachment interrogations are but one of many critical stages. *See Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2594 (2008) (Alito, J., concurring) (cataloging critical stages). Overruling *Jackson* implies that the police will be free to seek uncounseled waivers of counsel at all pre-trial critical stages. Consequently, courts will need to decide upon waiver language that is sufficient to advise the defendant of his right to counsel in the context of pre-trial line-ups, psychiatric exams, and the like. Again, until those questions are resolved, the admissibility of evidence obtained at those critical stages will be in doubt.

Indeed, tethering the validity of post-attachment custodial interrogations to the Fifth Amendment "voluntariness" test would call into question the many cases discussed in Part I that distinguish fundamentally between the protections of the two Amendments. If voluntariness is all that is required, then cases like *Henry* and *Moulton*, which held that voluntary statements made to undercover informants are inadmissible under the Sixth Amendment, should arguably come out the other way. *Compare, e.g., Arizona v. Mauro*, 481 U.S. 520 (1987) (permitting taping under Fifth Amendment)

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counseled defendant to question him after the Sixth Amendment right has attached, even if that questioning were found to be non-custodial. If *Jackson* were replaced by *Miranda*, it is not clear whether the police would even need to give a *Miranda* warning absent a custodial interrogation.

with *Maine v. Moulton*, 474 U.S. 159 (1985) (holding that the government could not introduce surreptitiously recorded statements into evidence after the right to counsel had attached (Sixth Amendment), but could do so in the pre-attachment (Fifth Amendment) context).

Third, all of these problems will be exacerbated because overturning *Jackson* would give the police a strong incentive to try to reach defendants before they have had a chance to consult with counsel. That is precisely what happened here. As Petitioner's opening brief recounted, the police reached Montejo shortly after he was appointed counsel, but before Montejo had a chance to meet with him. The police then obtained the uncounseled "waiver," and removed Montejo from the jail. To no one's surprise, when they returned they found Montejo's lawyer waiting at the jail "pretty upset that [the police] had been out with [him]." Opening Br. at 9-10.

Overturning *Jackson* would thus condition Sixth Amendment protections on the outcome of a race between the police and appointed defense counsel to meet with the defendant.[5] Effective defense counsel will rush to clients with clear instructions to invoke

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[5] Such an approach will disproportionately impact indigent defendants in jurisdictions with over-extended, understaffed, and under-resourced public defender systems. The *Jackson* rule ensures that the waiver of the Sixth Amendment right to counsel does not depend on arbitrary factors such as the speed with which defense counsel arrives at the jailhouse doors.

Edwards protections, while prosecutors and police officers attempt to outpace defense counsel in order to obtain one last unobstructed interrogation with the accused.[6] And courts will be forced to engage in the difficult and laborious task of deciding when the police have gone too far in using procedures "designed to circumvent" and "undermine[]" Sixth Amendment protections. *Seibert*, 542 U.S. at 618 (Kennedy, J., concurring in the judgment).

Jackson's bright-line rule obviates all of these serious problems, ensuring the police and the defense know what post-attachment conduct is permissible, while allowing a defendant to come forward and confess to the police of his own accord. *See Texas v. Cobb*, 532 U.S. 162, 182 (2001) (Breyer, J., dissenting) ("[Under *Jackson*, a] suspect may initiate communication with the police, thereby avoiding the risk that the police induced him to make, unaided, the kind of critical legal decision best made with the help of counsel, whom he has requested.").

III. *Stare Decisis* Strongly Supports Adhering To *Jackson*.

For the reasons set forth above, the rule of *Jackson* is both jurisprudentially sound and eminently practical. Thus, even if this were a matter of first impression, the Court would rightly adopt the very same Sixth Amendment rule today. But this is not a matter of first impression. It concerns a precedent that has been the firmly established law for nearly a quarter century, has been repeatedly cited and followed, and is fully consistent with the Court's Fifth and Sixth Amendment decisions over that entire time.

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[6] Counsel who failed to contact their clients quickly could be deemed ineffective under this scenario, adding further complexity and delay to prosecutions.

A. No Special Justification Exists To Overrule *Jackson*.

The doctrine of *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillary*, 474 U.S. 254, 265-66 (1986); *see also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) ("[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable"). Although *stare decisis* is not an "inexorable command," this Court has repeatedly recognized that precedents, including constitutional precedents, should not be overturned absent "some special justification." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). (quoting *State Oil v. Khan*, 522 U.S. 3, 20 (1997) and *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996)) (internal quotation marks omitted).

Typically, the Court's *stare decisis* analysis considers whether the "governing decisions are unworkable," *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); whether "subsequent cases have undermined their doctrinal underpinnings," *Dickerson*, 500 U.S.

at 443; whether any factual premises underlying the prior holding have so changed as to render the holding irrelevant or unjustifiable, *see Casey*, 505 U.S. at 855; *Vasquez*, 474 U.S. at 266; and whether the governing decision is "badly reasoned." *Payne,* 501 U.S. at 827. None of those considerations supports overturning *Jackson.*[7]

First, *Jackson* is not unworkable. To the contrary, its bright-line rule is easy to apply, and its limits on the interrogation of a counseled defendant have become "embedded in routine police practice." *Dickerson*, 530 U.S. at 443. Supplemental Br. of Amicus Curiae Larry D. Thompson, William Sessions, et al. 8-12 (prosecutors understand that they cannot interrogate a counseled defendant in the absence of his attorney). Neither this Court nor lower courts, nor the State amici have suggested that *Jackson*'s bright-line rule is difficult to administer. And the alternatives to *Jackson* are likely to create far more problems than they solve. *See supra.*

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[7] Nothing in *Pearson v. Callahan*, 129 S. Ct. 808 (2009) (overruling *Saucier v. Katz*, 533 U.S. 194, 201 (2001)), suggests a lesser standard for overruling *Jackson*. While the Court held that *stare decisis* was not a substantial obstacle to overruling a "judge-made rule that was recently adopted to improve the operation of the courts," 129 S. Ct. at 816, *Jackson* is a 23-year old constitutional decision that implements the Sixth Amendment's "purpose of protecting the unaided layman at critical confrontations with his adversary." 475 U.S. at 631 (internal quotation marks omitted). Different considerations thus apply.

Second, the core principles of *Jackson* remain intact even as subsequent cases have clarified the scope of its rule. *See, e.g.*, *Michigan v. Harvey*, 494 U.S. 344, 353 (1990) (permitting use of statements for impeachment); *Patterson*, 487 U.S. at 291 (holding that *Jackson* does not apply unless defendant has or requests a lawyer); *McNeil*, 501 U.S. at 175 (invocation of right is specific to the charged offense); *Cobb*, 532 U.S. at 168 (*Jackson* is offense-specific). Far from undermining *Jackson*, these cases have "reduced the impact of the ... rule on legitimate law enforcement while reaffirming [its] core ruling" that uncounseled statements resulting from police-initiated interrogation after the defendant has counsel cannot be used as evidence in the prosecution's case-in-chief. *Dickerson*, 530 U.S. at 443.

Third, none of the factual premises underlying *Jackson* have been rendered irrelevant in the intervening years. To the contrary, as explained above, it would disrupt and confuse the fabric of Fifth and Sixth Amendment law to overrule *Jackson* and replace it with a Fifth Amendment rule designed to protect a completely different constitutional right. *Jackson*'s core insight that an "unaided layman" requires the protection of counsel when "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law," 475 U.S. at 631, remains as valid today as it was when *Jackson* was decided. Indeed, given that the vast majority of criminal prosecution end before trial in a plea bargain, the need for the advice of counsel at the early stages of a prosecution is greater than ever.

Finally, as set forth in more detail above, *Jackson* is not "badly reasoned" or "unsound in principle." Just the opposite is true. The *Jackson* rule flows from the very text of the Constitution and protects the very core of the Sixth Amendment right to counsel. *See supra.*

Whatever this Court might do if writing on a clean slate, there is plainly no "special justification" that warrants overturning *Jackson* now.

B. This Case Is A Particularly Poor Vehicle For Reconsidering *Jackson.*

This case is a particularly poor vehicle to consider replacing *Jackson* with a *Miranda-Edwards* regime because the police behavior pressured and deceived Montejo in "a calculated way to undermine" the protections of *Edwards*, *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment), and to prevent him from consulting with his lawyer. The case is thus the polar opposite of a knowing, voluntary, and intelligent waiver of the right to counsel that application of *Edwards* to the Sixth Amendment would purportedly protect.

As Petitioner's opening merits brief explained, the waivers at issue here were the result of pressure and deceit on the part of the police that reflect a consistent effort to prevent consultation with counsel. Even prior to the 72-hour hearing, for example, Montejo was subjected to a series of harsh tactics by the police to dissuade him from relying on counsel. *See* Opening Br. of Petitioner 31 (recounting that when Montejo asked for a lawyer, the police responded by telling him they were going to charge him with first-degree murder).

Then, after the hearing, the police interposed themselves to interrogate Montejo prior to his lawyer's arrival. Montejo testified that, when approached by the police approached shortly after his counsel had been appointed, Montejo told the police "I think I got a lawyer appointed to me"; the police falsely told him "No, you don't .... I checked, you don't have a lawyer appointed to you." Opening Br. of Petitioner 8. Montejo thus "waived" his right to counsel only after facing days of pressure from the police not to rely on counsel and after wrongly being told that he did not have counsel. It was on the basis of this "waiver" that the police took Montejo away from the jail and obtained a confession, only to return to find Montejo's lawyer waiting at the jail "pretty upset that [the police] had been out with [him]." Opening Br. of Petitioner 9-10.

These facts take this case light years away from the paradigm of an autonomous defendant making a "free choice" to forgo the "assistance of counsel for his defense." Most obviously, the fact that the police falsely told Montejo that he did not have a lawyer is enough to invalidate any purported waiver.[8] And, unlike *Texas v. Cobb*, where the police had repeatedly obtained consent from Cobb's counsel prior to talking to him, here the police entirely bypassed Montejo's counsel to obtain a waiver at a critical moment in the case. Reply Br. of Petitioner 13-14.

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[8] The State has taken the position that Montejo's testimony on this point is untrue. But the Louisiana Supreme Court did not so hold. It declined to make a finding on this point, reasoning instead that the police would have been permitted to lie about the status of Montejo's counsel in any case under this Court's decision

Instead, the case is more like *Seibert*, where the police engaged in a "deliberate violation" to "obscure both the practical and legal significance of the admonition when finally given." 542 U.S. at 620. Here, as in *Seibert*, the persistent efforts of the police to discourage Montejo's exercise of the right to counsel including by denying the appointment of counsel at the 72-hour hearing could only have led Montejo to conclude that, as a practical matter, the right to counsel "did not exist." *Id.*

Overruling a constitutional precedent is an extraordinary step that should only be taken in an appropriate case. This is not that case. Even if this Court were to believe that the Sixth Amendment's right to the assistance of counsel would be adequately served by an "*Edwards*-type-regime," the Court should not impose that regime where the waiver at issue is the product of pressure and

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in *Moran*. *State v. Montejo*, 974 So. 2d 1238, 1261-63 (La. 2008). That reading of *Moran* is plainly erroneous given the decision's clear statement that the Sixth Amendment forbids the police from taking steps to interpose themselves between a defendant and his counsel. In any case, it is undisputed the police did not tell Montejo that he had counsel. As discussed in Part IV, that is sufficient to require reversal under any Sixth Amendment standard.

deception intended to undermine the very "free choice" that the Court wants to protect. Indeed, as discussed in the next section, even if this Court were inclined to overrule *Jackson* in a case where its operation impeded the admissibility of a statement plainly made as a result of the defendant's free will, this is not that case. The police overreaching in this case invalidates the waiver under any plausible Sixth Amendment standard. *Stare decisis* counsels in favor of leaving a long-standing constitutional precedent undisturbed where it would not make a difference in the outcome of the case.

IV. Even If The Court Were To Overrule *Jackson* In Part, It Should Retain As Much Of *Jackson's* Sixth Amendment Rule As Is Necessary To Prevent Police Overreaching And Should Hold Montejo's Statement Inadmissible Under That Rule.

Even if the Court concludes (and it should not) that the breadth of *Jackson* is improvident because it can operate to "supersede[s] the suspect's voluntary choice to speak with investigators," *Cobb*, 532 U.S. at 175 (Kennedy, J., concurring), a portion of the *Jackson* rule should be retained insofar as it forbids the police to initiate interrogation of a defendant who has a Sixth Amendment right to counsel and who has obtained or requested counsel when the interrogation is "designed to circumvent" and "undermines" *Seibert*, 542 U.S. at 618 (Kennedy, J., concurring in the judgment) the "efforts of a defendant's attorney to act as a "medium between [the suspect] and the State' during the interrogation" *Moran*, 475 U.S. at 428.

As explained above, Montejo testified that the police falsely told him that he did not have a lawyer when they sought his *Miranda* waiver. The police offered conflicting testimony, improbably asserting that they were not aware that Montejo had counsel appointed at his 72-hour hearing, even though they knew it was a capital case, and that the very purpose of the hearing was to appoint counsel.[9] Reply Br. of

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[9] At oral argument, counsel for the State could offer no explanation for this discrepancy:

JUSTICE GINSBURG: This is an experienced police officer. The 72-hour hearing is required in every case .... So how could an experienced police officer not know? Somebody, by the way, who knew this man had been kept until – even more than 72 hours. And he testifies ... I didn't know that he appointed – had been appointed a lawyer. The very same day that he got to the 72-hour hearing a day late, how could he not have known?

MS. LANDRY: I can't answer that question. I can only answer the question that all of the officers testified that they were not aware that counsel had been appointed for the defendant that morning.

JUSTICE KENNEDY: Well, of course, they know – it's a death case – that counsel is going to be appoint – or it's a murder case – that counsel is going to be appointed. Everybody knows that except this defendant. He doesn't know; of course he doesn't know.

MS. LANDRY: I understand. They testified that they weren't aware that counsel had not been appointed that morning.

Transcript of Oral Argument at 30:18-31:13.

Petitioner 14-16. Even if one credited the police's unlikely version of the events, that would not change the fact that by their own account they failed to inform Montejo that he actually had counsel when they sought his *Miranda* waiver. Whether the police lied to him on this point, or simply omitted that key fact, Montejo was misinformed about the true status of his counsel, and his waiver should not be credited. *See Moran*, 475 U.S. at 428 (*Miranda* waiver insufficient under Sixth Amendment where police fail to inform the defendant that he already has counsel).

An alternative rule, which would allow the police to seek a waiver through falsehoods or careful omissions, would make a mockery of the Sixth Amendment's guarantee of assistance. Thus, because the evidence is undisputed that Montejo was not given accurate information about his counsel at the time he received his *Miranda* warning, reversal of the Louisiana Supreme Court decision is still required even if this Court were to overrule *Jackson*.

CONCLUSION

This Court should not overrule *Jackson*, and the judgment of the Louisiana Supreme Court should be reversed.

JELPI P. PICOU
G. BEN COHEN
ROBERT J. SMITH
THE CAPITAL APPEALS PROJECT
636 BARONNE STREET
NEW ORLEANS, LA 70113
(504) 529-5955

PAUL M. SMITH
Counsel of Record
WILLIAM M. HOHENGARTEN
MATTHEW S. HELLMAN
ADAM G. UNIKOWSKY*
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001
(202) 639-6000

*Not admitted in DC; supervised by principals of the firm

SUPPLEMENTAL
BRIEF

125 (18)

Supreme Court, U.S.
FILED
APR 14 2009
OFFICE OF THE CLERK

No. 07-1529

In The
Supreme Court of the United States

JESSE JAY MONTEJO,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

SUPPLEMENTAL BRIEF FOR RESPONDENT

JAMES D. "BUDDY" CALDWELL
LOUISIANA ATTORNEY GENERAL
S. KYLE DUNCAN
APPELLATE CHIEF
LOUISIANA DEPARTMENT OF JUSTICE

POST OFFICE BOX 94005
BATON ROUGE, LA 70804
(225) 326-6765

KATHRYN LANDRY
Counsel of Record
WALTER P. REED
HOUSTON C. GASCON, III
SCOTT C. GARDNER
ST. TAMMANY PARISH
DISTRICT ATTORNEY'S OFFICE

POST OFFICE BOX 82659
BATON ROUGE, LA 70884
(225) 766-0223

Counsel for Respondent State of Louisiana

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SUPPLEMENTAL QUESTION PRESENTED

Should *Michigan v. Jackson*, 475 U.S. 625 (1986), be overruled?

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SUMMARY OF ARGUMENT

The Fifth and Sixth Amendments protect an accused in distinct ways. The Fifth helps him face police questioning, and so the Court has enacted powerful rules to "counteract the 'inherently compelling pressures' of custodial interrogation, including the right to have counsel present." *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991) (quoting *Miranda v. Arizona*, 384 U.S. 436, 475 (1966)); *see also Edwards v. Arizona*, 451 U.S. 477 (1981). The Sixth, in contrast, helps the accused face an expert government prosecutor by providing counsel to navigate "the intricacies of substantive and procedural criminal law." *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2583 (2008) (quotations omitted). These constitutional safeguards advance distinct policies, but in *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court conflated them, resulting in doctrinal confusion and unjustifiable social costs. The Court should now overrule *Jackson* and "bring[] its Fifth and Sixth Amendment jurisprudence into a logical alignment." *McNeil*, 501 U.S., at 183 (Kennedy, J., concurring).

Jackson held that, after attachment and invocation of the Sixth Amendment right to counsel, "*any* subsequent waiver during a police-initiated custodial interview is ineffective." *McNeil*, 501 U.S., at 175 (emphasis added). *Jackson* simply transplanted into the Sixth Amendment the rule of *Edwards v. Arizona*—a rule designed to safeguard the *Fifth* Amendment right against compelled self-incrimination. *Jackson*, 475 U.S., at 626, 630-36 (adopting *Edwards*). In doing so, *Jackson* created a perverse new rule that unjustifiably "supersedes the suspect's voluntary choice to speak with investigators," *Texas v. Cobb,* 532 U.S. 162, 175 (2001) (Kennedy, J., concurring), and thus violates the Fifth Amendment policies it was supposed to reinforce.

Jackson was anomalous from the day it was decided because the *Edwards* rule "makes no sense at all" outside the Fifth Amendment. *See Jackson,* 475 U.S., at 640 (Rehnquist, J., dissenting). Indeed, the Court would soon discard *Jackson*'s premises in subsequent decisions. *See, e.g., Cobb,* 532 U.S., at 175-76 (Kennedy, J., concurring) (discussing *Jackson*'s doctrinal erosion). More fundamentally, *Jackson* misperceived the nature of the "Assistance of Counsel" guaranteed by the Sixth Amendment. U.S. CONST. amend. VI. The Court should therefore overrule *Jackson* and remove an illogical and unnecessary accretion on this Court's Sixth Amendment jurisprudence that has been thoroughly undermined by subsequent decisions.[1]

In *Jackson*'s absence, an accused's free choice not to speak to police—or to speak only with counsel beside him—will still be protected by three layers: the Fifth Amendment, *Miranda* and *Edwards.* An accused will still enjoy counsel's Sixth Amendment assistance throughout pretrial critical phases, including custodial interrogation. And the Sixth Amendment will still bar police from circumventing an accused's right to counsel through subterfuge or other conduct that would not allow a *Miranda* waiver. *See, e.g., Patterson v. Illinois*, 487 U.S. 285, 296 n.9 (1988); *Massiah v. United States*, 377 U.S. 201, 205-07 (1964). Overruling *Jackson*, therefore, will not detract in the least from the essential protections of the Fifth and Sixth Amendment, but will instead bring needed coherence to the law and avoid the social cost inherent in suppressing a voluntary confession given in full compliance with *Edwards* and *Miranda*.

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[1] *See, e.g., Payne v. Tennessee,* 501 U.S. 808, 827-30 (1991) (explaining *stare decisis* is weakest when prior constitutional decisions are "unworkable or badly reasoned," "involv[e] procedural and evidentiary rules," were "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions," or "have been questioned by Members of the Court in later decisions") (citations omitted).

Discarding *Jackson* will also free investigators from an unfair presumption that, once the Sixth Amendment has attached, an accused's decision to speak without counsel must be the product of police overreaching. That presumption has no place in a Constitution that forbids *compelled* self-incrimination as a positive evil, U.S. CONST. amend. V, but welcomes "uncoerced confessions [as] ... an unmitigated good." *Cobb*, 532 U.S., at 172 (quoting *McNeil*, 501 U.S., at 181).

ARGUMENT

I. *JACKSON* RESTED ON WEAK FOUNDATIONS THAT HAVE BEEN COMPLETELY ERODED BY SUBSEQUENT DECISIONS OF THE COURT.

Jackson purports to strengthen the Sixth Amendment's guarantee of the "Assistance of Counsel" in criminal prosecutions. U.S. CONST. amend. VI. In reality, however, *Jackson*'s anti-waiver rule is only tenuously connected to that constitutional guarantee. Instead, *Jackson* extends a prophylaxis that rationally furthers only the *Fifth* Amendment right against compelled self-incrimination.[2] This Part explains *Jackson's* origins in the Fifth Amendment, why its original premises made little sense in the Sixth Amendment context, and why those premises have been undermined by subsequent decisions.[3]

Whether before or after attachment of the Sixth Amendment right to counsel, suspects have the Fifth Amendment right to demand counsel's presence, in order to counteract the "inherently compelling pressures" of interrogation. *Miranda v. Arizona*, 384 U.S. 436, 467-74 (1966). The Court later enacted the *Edwards* prophylactic rule "to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990) (discussing *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)). Once a suspect clearly invokes[4] his right to counsel during interrogation, not only will he be free from further police-initiated questioning outside counsel's presence, but his subsequent waiver—even if voluntary, knowing, and intelligent—will be presumed invalid. 451 U.S., at 484.

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[2] *See, e.g., McNeil*, 501 U.S., at 176 (discussing "right to counsel" found in Court's Fifth Amendment anti-coercion jurisprudence).

[3] Part II, *infra*, explains why *Jackson's* exaggerated anti-waiver rule is based on a fundamental misperception of counsel's Sixth Amendment role during questioning.

[4] *See Davis v. United States*, 512 U.S. 452, 459-62 (1994) (requiring that an *Edwards* invocation be unambiguous); *see also infra* Part I.B.

Five years later, *Michigan v. Jackson* engineered "a wholesale importation of the *Edwards* rule into the Sixth Amendment." *Cobb*, 532 U.S., at 175 (Kennedy, J., concurring); *Jackson*, 475 U.S., at 635-36. Under *Jackson*, a defendant's "assertion" of his right to counsel "at an arraignment or similar proceeding" triggers the *Edwards* effect: the police may not subsequently initiate questioning outside counsel's presence, and any waiver of counsel under such circumstances is ineffective. *Id.* *Jackson* thus applied the *Edwards* anti-coercion rule outside the immediate context of custodial interrogation. It also allowed *Edwards* to be triggered by a Sixth Amendment "invocation" that, as the Court later explained, "as a matter of *fact*, [does] *not* ... invoke the *Miranda-Edwards* interest." *McNeil*, 501 U.S., at 178.

Jackson's harsh anti-waiver rule was based on a misunderstanding of counsel's Sixth Amendment function during questioning. *See infra* Part II. But as Part I.B *infra* explains, *Jackson*'s own internal reasoning for adopting that rule cannot withstand scrutiny. The *Jackson* dissenters—since echoed by individual Justices—recognized that *Jackson*'s premises were flawed from conception. Moreover, subsequent decisions have unraveled *Jackson*'s analytical framework. *Jackson* is "a mere survivor of obsolete constitutional thinking" and should therefore be overruled.[5]

A. From the beginning, the *Edwards* anti-coercion rule fit poorly in the Sixth Amendment context.

Jackson was based on three distinct premises that were either faulty when the case was decided, are untenable today in light of subsequent precedent, or both.

- *One.* *Jackson* thought the anti-coercion rationale of *Edwards* was "even *stronger* after [an accused] has been formally charged with an offense than before." 475 U.S., at 631-32 (emphasis added).
- *Two.* *Jackson* gave "a broad, rather than a narrow, interpretation to a defendant's request for counsel," and so rejected the argument that an accused requesting counsel at arraignment "may not have actually intended [his] request to encompass representation during any further questioning by the police." *Id.*, at 632-33.
- *Three.* *Jackson* simply imported *Edwards*'s Fifth Amendment rule, finding "no warrant for a different view under [the] Sixth Amendment," and therefore concluded:

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[5] *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992); *see also United States v. Gaudin*, 515 U.S. 506, 521 (1995) (explaining that *stare decisis* yields when a prior decision's "underpinnings [have been] eroded ... by subsequent decisions of [the] Court").

> Just as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in the Sixth Amendment analysis. *Id.*, at 635.

Exposing the weakness of *Jackson*'s original premises begins with then-Justice Rehnquist's dissent (joined by Justices Powell and O'Connor), because subsequent decisions of the Court (and opinions by other Justices) have adopted and reinforced the dissent's fundamental objections. The dissenters focused on three weaknesses in the majority's analysis.

The dissenters first emphasized the fundamental point that *Edwards*'s prophylactic rule was intended to reinforce only the Fifth Amendment's prohibition on compelled self-incrimination. 475 U.S., at 638-40 (Rehnquist, J., dissenting). Applying that anti-coercion rule in the Sixth Amendment context, the dissent explained, "cut[s] the *Edwards* rule loose from its analytical moorings." *Id.*, at 640. "To put it simply," the dissent concluded, "the prophylactic rule set forth in *Edwards* makes no sense at all except when linked to the Fifth Amendment's prohibition against compelled self-incrimination." *Id.* Three different Justices have since echoed the *Jackson* dissenters' basic criticism that transplanting *Edwards* into the Sixth Amendment context was a mistake. *See Cobb*, 532 U.S., at 175 (Kennedy, J., concurring) (criticizing *Jackson*'s "wholesale importation of the *Edwards* rule into the Sixth Amendment").

Second, the dissenters charged that application of the new *Jackson* rule "graphically reveal[ed] [its] illogic." 475 U.S., at 640 (Rehnquist, J., dissenting). While the *Jackson* bar was triggered by the "assertion" of an accused's right to counsel, attachment of the Sixth Amendment right is not tied to any assertion by a defendant. *Id.*, at 640-41. The *Fifth* Amendment right does arise only when invoked: linking *Edwards*'s prophylactic rule to an "assertion" thus makes sense. *Id.* But applying *Edwards* to the Sixth Amendment, which does not depend on any assertion, left *Jackson* in an "analytical straitjacket." *Id.*, at 641. The *Jackson* rule would be limited "to those defendants foresighted enough, or just plain lucky enough, to have made an explicit request for counsel which we have always understood to be completely unnecessary for Sixth Amendment purposes." *Id.*, at 642. Again, in agreement with the *Jackson* dissenters, three different Justices have since observed that, because "[t]he Sixth Amendment right to counsel attaches quite without reference to the suspect's choice to speak with investigators after a *Miranda* warning ... it thus makes little sense for a protective rule to attach absent such an election by the suspect." *Cobb*, 532 U.S., at 176 (Kennedy, J., concurring).

Third, the dissenters viewed *Jackson* as an anomalous extension of the Court's waiver jurisprudence. They observed that the Court had previously erected *per se* barriers against certain police conduct. *See id.*, at 641 n.4 (Rehnquist, J., dissenting) (citing *Maine v. Moulton*, 474 U.S. 159 (1985); *United States v. Henry*, 447 U.S. 264 (1980); *Massiah v. United States*, 377 U.S. 201 (1964)). But those were "surreptitious informant" cases, in which an accused did not realize he was being questioned by a government agent and therefore had no opportunity to waive his right to counsel. *Id.* It made little sense to extend these precedents to the circumstances of *Jackson*, in which "the conduct of the police was totally open and aboveboard." *Id.*

There was another critical inconsistency in *Jackson* that was not discussed by the dissent. *Jackson*'s second premise was based on a flawed conflation of a defendant's "assertion" and his "waiver" of the right to counsel. 475 U.S., at 632-33 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). But a defendant's effective or ineffective "assertion" of his right to counsel is in no sense a "waiver" of that right: the two concepts are analytically distinct, and therefore *Zerbst* provides no basis for "broadly" construing a defendant's assertion. More concretely, however, this aspect of *Jackson* flatly contradicted the Court's statement two years earlier in *Smith v. Illinois* that "[i]nvocation and waiver [of the right to counsel] are entirely distinct inquiries, and the two must not be blurred by merging them together." 469 U.S. 91, 98 (1984). *Jackson* made precisely that error, and therefore contravened the Court's own precedent.

B. Subsequent decisions have abandoned *Jackson*'s premises.

The Court discarded *Jackson*'s first premise a mere two terms later in *Patterson v. Illinois*, 487

U.S. 285 (1988). *Jackson* had said that "the reasons for prohibiting the interrogation of an uncounseled accused are *even stronger* after he has been formally charged with an offense than before." 475 U.S., at 631 (emphasis added). But in deciding that *Miranda* warnings supported waiver of both the Sixth and Fifth Amendment rights to counsel, *Patterson* reasoned:

> The State's decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose that an attorney serves when the accused is questioned by authorities. With respect to this inquiry, we do not discern a substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at postindictment questioning. 487 U.S., at 298-99.[6]

But that core proposition from *Patterson* plainly repudiated *Jackson*'s first premise. In *Cobb,* furthermore, three Justices recognized precisely that: *Patterson* undermined *Jackson*. *See* 532 U.S., at 175 (Kennedy, J., concurring) (discussing *Patterson*).

Jackson's second premise—conceptually flawed and contrary to *Smith v. Illinois* from the beginning—was further damaged by *Davis v. United States*, 512 U.S. 452 (1994). *Davis* held that a defendant's assertion of his right to counsel must be sufficiently clear and unambiguous "that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.*, at 459. Otherwise it would fail to trigger *Edwards*. *Id.*

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[6] An "important basis" for *Patterson* was counsel's "rather unidimensional role" in post-indictment questioning, "largely limited to advising his client as to what questions to answer and which ones to decline to answer." 487 U.S., at 294 n.6; *see infra* Part II.A.

Davis strictly construed a defendant's request for counsel, resolving any ambiguity in favor of the police.[7] *Jackson* had liberally construed the same request, resolving any ambiguity in favor of the accused. 475 U.S., at 633. There is no reason to assume that an *Edwards* assertion need be any less clear in the Sixth Amendment context. Indeed, to support the *Edwards* effect, the Sixth Amendment should require a *clearer* "assertion" since it would come, if at all, outside the context of interrogation. *Davis* therefore directly undermined *Jackson*'s second premise. In *Cobb*, three Justices recognized just that: *Davis* is "further reason to doubt the wisdom of the *Jackson* holding." *Cobb*, 532 U.S., at 175-76 (Kennedy, J., concurring).

Finally, *McNeil v. Wisconsin*, 501 U.S. 171 (1991), dealt the last blow to *Jackson*'s reasoning. *McNeil* held that an accused's invocation of his Sixth Amendment right to counsel is not, as a matter of fact or policy, an invocation of his Fifth Amendment right to counsel. 501 U.S., at 177-81. *McNeil* reasoned that defendants invoke their Fifth and Sixth Amendment rights to counsel for distinctly different purposes: (1) the Sixth, to insure postindictment protection "at critical confrontations with his expert adversary, the government," *id.*, at 177-78; (2) the Fifth, "to protect a quite different interest: a suspect's 'desire to deal with the police only through counsel,'" *id.*, at 178 (quoting *Edwards*, 451 U.S., at 484). Assertion of the Sixth Amendment right (a *Jackson* assertion) was not, as a matter of fact, the assertion of the Fifth Amendment right (an *Edwards* assertion). *Id.* Nor would such a rule be sound policy, because it would effectively render any accused "unapproachable by police officers suspecting them of involvement in other crimes, even though they have never expressed any unwillingness to be questioned." *Id.*, at 180-81. The Court rejected that result as destructive of a paramount pubic interest: "Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser." *Id.*, at 181.

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[7] *See id.*, at 461 (reasoning that a bright line is needed because "it is police officers who must actually decide whether or not they can question a suspect").

McNeil obliterated *Jackson*'s third premise by completely severing the *Jackson* anti-waiver rule from any tie to *Edwards*. Simply put, a *Jackson* invocation is factually and legally different from an *Edwards* invocation. 501 U.S., at 179. This means that, today, the *Jackson* rule exists only as a disembodied presumption. *See*, *e.g.*, *id.* (characterizing a *Jackson* assertion as merely a "legally presumed ... request for the assistance of counsel in custodial interrogation"). In *Cobb*, three Justices recognized that this fundamental problem rendered the *Jackson* rule pointless:

> [T]he acceptance of counsel at an arraignment or similar proceedings only begs the question: acceptance of counsel for what? It is quite unremarkable that a suspect might want the assistance of an expert in the law to guide him through hearings and trial, and the attendant complex legal matters that might arise, but nonetheless might choose to give on his own a forthright account of the events that occurred. A court-made rule that prevents a suspect from even making this choice serves little purpose, especially given the regime of *Miranda* and *Edwards*. 532 U.S., at 177 (Kennedy, J., concurring).

In sum, overruling *Jackson* will simply recognize what *Patterson*, *Davis* and *McNeil* have already made it: a hopeless anomaly.

II. *JACKSON* MISPERCEIVED THE NATURE OF THE "ASSISTANCE OF COUNSEL" AFFORDED DURING CUSTODIAL INTERROGATION.

In addition to its internal flaws, *Jackson* should be discarded in light of the very Sixth Amendment right to counsel it is said to protect. *Jackson* interprets counsel's role during custodial interrogation in a manner irreconcilable with the meaning and purpose of the Sixth Amendment, as well as the Court's broader jurisprudence. *Jackson* consequently erected an exaggerated anti-waiver rule, transforming counsel from an advisor into a shield against voluntary confessions.

A. Counsel's "simple and limited" Sixth Amendment role in questioning requires only a "simple and limited" waiver standard.

Since "an unaided layman ha[s] little skill in arguing the law or in coping with an intricate procedural system," the Sixth Amendment right to counsel guarantees him "a guide though complex legal technicalities." *United States v. Ash*, 413 U.S. 300, 307 (1973). Its "core purpose" is expert aid at the trial event, when "the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States v. Gouveia*, 467 U.S. 180, 188-89 (1984) (quoting *Ash*, 413 U.S. at 309). The rise of the "public prosecutor" in colonial America explains this central function of the Sixth Amendment:

> The accused in the colonies faced a government official whose specific function it was to prosecute, and who was incomparably more familiar than the accused with the problems of procedure, the idiosyncrasies of juries, and, last but not least, the personnel of the court.

Ash, 413 U.S. at 308 (quoting F. HELLER, THE SIXTH AMENDMENT 20-21 (1951)).[8]

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[8] *See also Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) (explaining that Sixth Amendment protects defendants who lack "the professional legal skill to protect [themselves] ... before a tribunal ... wherein the prosecution is presented by experienced and learned counsel").

While focused on trial, the Sixth Amendment right to counsel becomes operative, before trial, upon the initiation of "adversary judicial proceedings," when the defendant is first "immersed in the intricacies of substantive and procedural criminal law." *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2583 (2008) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)). Thus the Court applies the right, after attachment, to all proceedings deemed "critical"[9]—stages where "the accused [is] confronted, *just as at trial*, by the procedural system, or by his expert adversary, or both." *Gouveia*, 467 U.S., at 189 (quotations omitted) (emphasis added).[10]

The Court discerns critical stages by asking whether, during a particular event, "the accused require[s] aid in coping with legal problems or assistance in dealing with his adversary." *Ash*, 413 U.S., at 313.[11] For example, at arraignment an accused needs a lawyer to "advis[e] [him] on available defenses ... [and] to allow him to plead intelligently." *Id.* at 312 (discussing *Hamilton v. Alabama*, 368 U.S. 52, 54-55 (1961); *White v.*

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[9] *See, e.g., United States v. Wade*, 388 U.S. 218, 224 (1967) (explaining that "the Sixth Amendment guarantee ... appl[ies] to 'critical' stages of the proceedings").

[10] *See also Ash*, 413 U.S., at 310 (reasoning that the right to counsel extends to "pretrial events that might appropriately be considered ... parts of the trial itself").

[11] *See also Rothgery*, 128 S. Ct., at 2589 (explaining that a government's "commitment to prosecute" triggers Sixth Amendment protection by "defin[ing] [the accused's] capacity and control[ling] his actual ability to defend himself against a formal accusation that he is a criminal").

Maryland, 373 U.S. 59, 60 (1963)). Likewise, he requires legal assistance at a post-indictment lineup given the peculiar pitfalls and "grave potential for prejudice" inherent in such encounters. *United States v. Wade*, 388 U.S. 218, 236-37 (1967). Finally, during interrogation—as the Court explained in a case where the prosecution secretly recorded the accused's conversations—"counsel could have advised [the accused] on the benefits of the Fifth Amendment and could have sheltered him from the overreaching of the prosecution." *Ash*, 413 U.S., at 312 (discussing *Massiah*, 377 U.S., at 205). In sum, the lawyer's Sixth Amendment role at these stages "has remained essentially the same as his function at trial ... [*i.e.*] act[ing] as a spokesman for, or advisor to, the accused." *Ash*, 413 U.S., at 412.[12]

But even when counsel's pretrial assistance is constitutionally guaranteed, the accused can waive it. *See, e.g., Patterson*, 487 U.S., at 296 (explaining an accused's Sixth Amendment "waiver on [the basis of *Miranda* warnings] will be considered a knowing and intelligent one"). What a waiver demands depends on a "pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." *Id.*, at 298. Thus, waiver of counsel *at trial itself* is strait-jacketed by "the most rigorous restrictions," given the "enormous importance and role that an attorney plays at a criminal trial." *Id.* (citing *Faretta v. California*, 422 U.S. 806, 835-36 (1975)).

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[12] *See generally, e.g., Rothgery*, 128 S. Ct., at 2594-95 (Alito, J., concurring) (discussing application of Sixth Amendment right to critical pretrial stages).

Critically for the present case, however, *Patterson* emphasized that "the role of counsel at [post-indictment] questioning"—while protected by the Sixth Amendment"—is nonetheless "*relatively simple and limited*." *Id.*, at 300 (emphasis added). In contrast to "later phases of criminal proceedings," counsel's earlier role at questioning is "substantially different," even "unidimensional: largely limited to advising his client as to what questions to answer and which ones to decline to answer." *Id.*, at 294 n.6. Furthermore, although an indictment triggers the Sixth Amendment right to counsel, nonetheless it

> … does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose that an attorney serves when the accused is questioned by authorities. *Id.*, at 298-99.

Finding counsel's Sixth Amendment role at questioning "simple and limited," the Court had "no problem in having a waiver procedure at that stage which is likewise simple and limited." *Id.*, at 300. Consequently, *Patterson* held the same *Miranda* warnings supporting waiver of the Fifth Amendment right to counsel also support waiver of the Sixth Amendment right. *Id.*, at 298-300.

An accused's free, informed, and unilateral waiver of counsel under such circumstances is perfectly consistent with his enjoying a constitutionally-protected right to counsel. As the Court explained in *Cobb*, "there is no 'background principle' of our Sixth Amendment jurisprudence establishing that there may be no contact between a defendant and police without counsel present." 532 U.S., at 171 n.2. After all, "the Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor." *Moran v. Burbine*, 475 U.S. 412, 430 (1986).

B. *Jackson* exaggerates the required waiver by warping counsel's Sixth Amendment role in questioning.

In light of the general principles explained above, *Jackson* is an aberration. The problem with *Jackson* is not that it assigned counsel a Sixth Amendment role in post-indictment questioning, but that it misperceived that role and constructed an exaggerated waiver requirement based on that misperception.

Jackson's anti-coercion origins, *see supra* Part I, show it to be fundamentally at odds with the Court's general understanding of the Sixth Amendment right to counsel and the proper standards for its waiver during custodial interrogation. The Sixth Amendment furnishes a skilled advocate preeminently as a *trial* protection, and extends to earlier "trial-type confrontations" *Gouveia*, 467 U.S., at 190, only to safeguard the integrity of the trial event itself.[13] *See supra* Part II.A. In other words, the "defence" protected by the counsel guarantee "means defense at trial, not defense in relation to other objectives that may be important to the accused." *Rothgery*, 128 S. Ct., at 2594 (Alito, J., concurring) (interpreting U.S. CONST. amend. VI). Against that backdrop, the Court has recognized that counsel's Sixth Amendment role during *pretrial* interrogation is "relatively simple and limited [...] to advising his client as to what questions to answer and which ones to decline to answer." *Patterson*, 487 U.S., at 300, 294 n.6. And the Court consequently approved a "waiver procedure at that stage which is likewise simple and limited." *Id.* at 300; *see supra* Part II.A.

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[13] *See, e.g.*, *Gouveia*, 467 U.S., at 189 (explaining that Sixth Amendment counsel right extends to pretrial stages "where the results of the confrontation 'might well settle the accused's fate and reduce the trial itself to a mere formality'") (quoting

But *Jackson* implicitly assigned a far different Sixth Amendment role to counsel during post-indictment questioning, and explicitly demanded a far higher waiver standard. *Jackson* fancies counsel so critical at that stage that counsel's absence *presumptively invalidates* a waiver—even if voluntary, knowing, and intelligent. In *Jackson*'s world, then, counsel effectively acts as a shield, not against police badgering (which *Miranda-Edwards* already prevent), but against the accused's own free election to speak to the police in the first place. *See, e.g., Cobb*, 532 U.S., at 175 (Kennedy, J., concurring) (observing that "[w]hile the *Edwards* rule operates to preserve the free choice of a suspect

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Wade, 388 U.S., at 224); *see also Rothgery*, 128 S. Ct., at 2590 (observing that initial appearance triggers Sixth Amendment right to counsel since at that point, "a defendant ... is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives").

to remain silent, if *Jackson* were to apply it would override that choice").

But that distorts the Sixth Amendment role this Court has described for counsel during questioning. At that stage, *Jackson* does not rationally safeguard counsel's role as a "guide through complex legal technicalities." *Ash*, 413 U.S., at 307; *see also supra* Part II.A. That *could not* be a function *Jackson* hoped to protect, since, as *Patterson* explained, counsel's role during questioning is "simple," "limited" and "unidimensional." *See* 487 U.S., at 300, 294 n.6.[14] More to the point, *Jackson* does not envision Sixth Amendment counsel as *merely* instructing the accused "as to what questions to answer and which ones to decline to answer." *Id.*, at 294 n.6. Instead, the upshot of *Jackson*'s anti-waiver rule is that, during questioning, counsel should simply tell an accused to keep silent.

Well before *Jackson*, the Court explained counsel's function during questioning was to "advis[e] his client on the benefits of the Fifth Amendment and ... shelter[] him from the overreaching of the prosecution." *Ash*, 413 U.S., at 312 (discussing *Massiah*, 377 U.S., at 205). The Court has since clarified that *Miranda* warnings perform the same function, by "convey[ing] [to the accused] ... the sum and substance of the rights that the Sixth Amendment provide[s]." *Patterson*, 487 U.S., at 293.[15] But *Jackson* is at odds with these principles because it presumptively invalidates a properly Mirandized waiver.

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[14] *See also Rothgery*, 128 S. Ct., at 2594 (Alito, J., concurring) (interpreting Court's critical stage jurisprudence "to require the appointment of counsel only after the defendant's prosecution has begun, *and then only as necessary to guarantee the defendant effective assistance at trial*") (emphasis added).

Jackson's anti-waiver rule, then, must be premised on the notion that, if counsel were present during questioning, he should always *overstep* his proper Sixth Amendment role. That is, *Jackson* appears to expect counsel to go beyond merely explaining why the accused need not speak, and instead to make sure the accused says nothing, even if he *wants* to come clean. But as the Court explained in *Moran*, "[t]he Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor." 475 U.S., at 430.[16]

Jackson's conception of Sixth Amendment counsel violates that basic principle. It does not actually protect an accused's free will, but to the contrary "operates to invalidate a confession given by the free choice of suspects who have received proper advice of their *Miranda* rights but waived them nonetheless." *Cobb*, 532 U.S., at 174-75

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[15] *See also Davis*, 512 U.S., at 460 (explaining that "the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves").

[16] *See also Cobb*, 532 U.S., at 171 n.2 (explaining that "there is no 'background principle' of our Sixth Amendment jurisprudence establishing that there may be no contact between a defendant and police without counsel present").

(Kennedy, J., concurring). While it may be true that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances," *Watts v. State of Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring and dissenting), the Sixth Amendment itself is more ambivalent. It lets the accused decide for himself whether to talk.

Since *Jackson* fundamentally misperceives counsel's Sixth Amendment role during questioning, and erects an exaggerated anti-waiver rule based on that misperception, *Jackson* departs from this Court's Sixth Amendment jurisprudence and should be overruled.[17]

III. ELIMINATING *JACKSON* WILL LEAVE UNDISTURBED FIFTH AND SIXTH AMENDMENT SAFEGUARDS ON AN ACCUSED'S RIGHT TO COUNSEL.

Discarding *Jackson* and its dubious benefits will leave an accused with the robust protections already provided by the Fifth and Sixth Amendments. An accused will, for instance, still be able to raise his silence or his demand for counsel as a Fifth

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[17] This Court's recent decision in *Rothgery* does not commit it to upholding, nor does it otherwise approve, *Jackson*'s anti-waiver rule. *Rothgery*'s "narrow" holding only addresses when the Sixth Amendment counsel right *attaches*, 128 S. Ct., at 2592, and explicitly avoids deciding "the scope of an individual's postattachment right to the presence of counsel," *id.*, at 2591 n.15. Thus, *Rothgery* does not touch on the continuing validity of *Jackson*'s anti-waiver rule. *See also id.*, at 2592, 2594 (Alito, J., concurring) (joining Court's opinion because it only addresses *when* the Sixth Amendment attaches and not "*what* the right guarantees").

Amendment shield against police questioning, nullifying any subsequent police-initiated waivers. Furthermore, an accused will still have a Sixth Amendment right to counsel at post-indictment questioning—but he will simply be able to waive it on the same terms, and under the same safeguards, as his Fifth Amendment right. Finally, an accused will still be shielded by the Sixth Amendment from surreptitious tactics that would not furnish the opportunity for a *Miranda* waiver. *See, e.g., Patterson*, 487 U.S., at 296 n.9; *Massiah*, 377 U.S., at 205-07. *Jackson*'s demise will, in short, have no real effect on an accused's ability to counteract the "inherently compelling" pressures of custodial interrogation through the medium of counsel. *See Miranda*, 384 U.S., at 467.

Even assuming an accused happens to "invoke" *Jackson* at or following Sixth Amendment attachment,[18] his subsequent confrontation with investigators reveals just how illusory and superfluous *Jackson*'s benefits are. "[T]here can be no doubt that a suspect must be apprised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation." *Cobb*, 532 U.S., at 171 (citing *Miranda*, 384 U.S., at 479; *United States v. Dickerson*, 530 U.S. 428, 435 (2000)). Those warnings, of course, support a waiver of either the

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[18] *See Jackson*, 475 U.S., at 642 (Rehnquist, J., dissenting) (criticizing practical limit on availability of *Jackson* bar to "those defendants foresighted enough, or just plain lucky enough" to have explicitly requested counsel outside the context of custodial interrogation).

Fifth or Sixth Amendment rights to counsel. *Patterson*, 487 U.S., at 296. And this Court has explained that "the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves." *Davis*, 512 U.S., at 460.

But an accused who wants the help of counsel in dealing with the pressures of interrogation need only say four words, "I want my lawyer." From that moment, *Edwards* will shield him from any further police-initiated questioning and presumptively nullify any subsequent waiver of the right to counsel—even if the accused meant to waive it. And it will ensure him the *presence* of an attorney. *McNeil*, 501 U.S., at 177 (citing *Minnick v. Mississippi*, 498 U.S. 146 (1990)). Given this armory of constitutional and prophylactic rights that are activated by an accused's mouthing four simple words, one might ask: what is the purpose of the additional, dubious protection afforded by *Jackson*? The answer: none.

While *Jackson*'s benefits are scant, its costs are steep. Its disruption of Sixth Amendment jurisprudence has already been detailed. *See supra* Part II. But *Jackson* also undermines the very Fifth Amendment anti-coercion principles it purported to reinforce. After all, *Jackson* simply adopted *Edwards*, whose "essence" was "[p]reserving the integrity of an accused's choice to communicate with police only through counsel." *Patterson*, 487 U.S., at 291. *Edwards* was assertedly *not* about "barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone."

Id. But, as three members of this Court have already observed, *Jackson* undermines *Edwards* by doing precisely that: "[w]hile the *Edwards* rule operates to preserve the free choice of a suspect to remain silent, ... *Jackson* ... would override that choice." *Cobb,* 532 U.S., at 175 (Kennedy, J., concurring).

And when *Jackson* overrides an accused's "free choice," it does more than disrupt the Court's jurisprudential architecture. It also prevents the admission of otherwise valid confessions. No sensible rule of constitutional law should desire that outcome, particularly in an area that has not been plagued with the same "perceived widespread problem[s]" that inspired and justified the regime of *Miranda* and *Edwards. See Jackson,* 475 U.S., at 639-40 (Rehnquist, J., dissenting). Without tangible, compensating benefits, *Jackson* unreasonably hampers "the ready ability to obtain uncoerced confessions." *McNeil,* 501 U.S., at 181. Since that ability "is not an evil but an unmitigated good," *id.*, at 181, *Jackson* should go.

CONCLUSION

Jackson furthers "a thinly disguised constitutional policy of minimizing or entirely prohibiting the use of evidence of voluntary out-of-court admissions and confessions made by the accused." *Massiah,* 377 U.S., at 209 (White, J., dissenting). But since the law "rejoice[s] at an honest confession," *Minnick,* 498 U.S., at 167 (Scalia, J., dissenting), the Sixth Amendment should not bar one freely given by an accused who has not declared he will communicate only through counsel, and has even voluntarily waived that right. *Jackson*'s contrary rule furthers, not the Sixth Amendment, but a paternalism that "imprison[s] a man in his privileges and call[s] it the Constitution." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942).

The Court should overrule *Michigan v. Jackson*.

Respectfully submitted,

JAMES D. "BUDDY" CALDWELL
Louisiana Attorney General
S. KYLE DUNCAN
Appellate Chief
Louisiana Department of Justice

Post Office Box 94005
Baton Rouge, LA 70804
(225) 326-6765

KATHRYN LANDRY
Counsel of Record
WALTER P. REED
HOUSTON C. GASCON, III
SCOTT C. GARDNER
St. Tammany Parish District Attorney's Office

Post Office Box 82659
Baton Rouge, LA 70884
(225) 766-0223

April 14, 2009

REPLY
BRIEF

125

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No. 07-1529

FILED
APR 24 2009
OFFICE OF THE CLER
SUPREME COURT, U.S

IN THE
Supreme Court of the United States

JESSE JAY MONTEJO,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

REPLY SUPPLEMENTAL BRIEF FOR PETITIONER

JELPI P. PICOU
G. BEN COHEN
ROBERT J. SMITH
THE CAPITAL APPEALS PROJECT
636 BARONNE STREET
NEW ORLEANS, LA 70113
(504) 529-5955

PAUL M. SMITH
Counsel of Record
WILLIAM M. HOHENGARTEN
MATTHEW S. HELLMAN
ADAM G. UNIKOWSKY*
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001
(202) 639-6000

*Not admitted in DC; supervised by principals of the firm

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INTRODUCTION

For the better part of a century, this Court has recognized that the Sixth Amendment entitles a defendant to have "the guiding hand of counsel at every step" of a prosecution against him. *Powell v. Alabama*, 287 U.S. 45, 69 (1932). And going back at least as far as *Brewer v. Williams*, 430 U.S. 387 (1977), this Court has held that the Sixth Amendment's guarantee of assistance bars the police from circumventing a defendant's counsel after a prosecution has commenced and attempting to interrogate the defendant outside his counsel's presence. Louisiana and its *amici* have asked this Court to overturn that rule, which has become known as the *Michigan v. Jackson* rule, 475 U.S. 625, 636 (1986), and which the Court has reaffirmed in cases like *Moran v. Burbine* and *McNeil v. Wisconsin*, among others. This Court should not take that step.

Far from showing that the *Jackson* rule is unworkable, the briefs of Louisiana and its *amici* reveal exactly what the *amici* former prosecutors have concluded: *Jackson*'s bright-line rule is used and relied upon by police and prosecutors every day to obtain clear guidance about the admissibility of post-attachment statements. Having largely ceded the argument that *Jackson* should be overturned on practicality grounds, Louisiana falls back on the nonsequitur that the *Jackson* rule is unnecessary to protect against coercion under the Fifth Amendment. But *Jackson* is a Sixth Amendment rule that "rejects any equivalence" between Fifth and Sixth Amendment rights. *McNeil v. Wisconsin*, 501 U.S.

171, 179 (1991). *Jackson* is thus neither unworkable nor unreasonable, and there is no warrant – let alone grounds in this case, which involved the rank circumvention of Montejo's counsel – for this Court to overturn it.

ARGUMENT

I. Louisiana, The United States, And The State *Amici* Effectively Recognize That The *Jackson* Rule Is Workable And Does Not Impede Law Enforcement.

The supplemental briefs of Louisiana, the United States, and the State *amici* confirm that *Jackson* is administrable and has virtually no, if any, impact on legitimate law enforcement. The United States candidly admits that *Jackson* has not "resulted in the suppression of significant numbers of statements." U.S. Br. 12. Louisiana and its handful of State *amici* cite no evidence to contradict the United States' view. Indeed, it is hard to see how there could be any legitimate law enforcement interest in overturning *Jackson* because ethical rules generally prohibit prosecutors from contacting counseled defendants in the absence of their attorneys. *See* U.S. Br. 11; La. Rules of Prof'l Conduct R. 4.2.[1] Moreover, law enforcement is facilitated – not hindered – by "an easily enforceable rule [that] provides ... a straightforward, objective standard to determine whether ... confessions are admissible." Larry D. Thompson, William Sessions, *et al.* ("Former Prosecutors and Judges") Br. 3.

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[1] *See also* U.S. Br. 11-12 ("[L]aw enforcement interests are not well-served when law enforcement agents have an incentive to communicate with represented defendants without direction from prosecutors").

To be sure, the United States hypothesizes a handful of "infrequent" scenarios in which *Jackson*'s bright-line rule might "potentially" cause confusion about when the prosecution could interrogate a defendant. U.S. Br. 12. Yet, neither the United States nor Louisiana or the handful of other States seeking the overruling of *Jackson* are able to cite a single instance where *Jackson* actually did cause confusion for either prosecutors or the courts. A rule that is concededly workable, that has not resulted in the suppression of significant evidence, and that tracks ethical norms hardly presents the "special justification" this Court requires to overturn a precedent. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

Moreover, there are powerful practical reasons for *retaining* the *Jackson* rule. Louisiana contends that even without *Jackson*, *Miranda* warnings and restrictions on the circumvention of counsel will be sufficient to protect a defendant's Sixth Amendment rights. But as Petitioner's opening supplemental brief explains, these protections will be far harder to administer than the bright-line *Jackson* rule. Petr. Supp. Br. 9-14; *see also* U.S. Br. 6 (predicting a case-by-case examination of whether an uncounseled waiver was obtained "through circumvention of the defendant's right to counsel").[2]

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[2] Replacing *Jackson* with *Edwards* may be further complicated by whether the "*Edwards* protection

One need look no further than this case to see the difficulties that abandoning the *Jackson* rule would cause. Louisiana's approach would have reviewing courts attempt to determine what Montejo said at the untranscribed hearing at which counsel was appointed, and then – assuming that the right to counsel was not invoked at the hearing – determine whether the police engaged in circumvention by approaching Montejo for a waiver immediately after the hearing before Montejo had ever had a chance to consult with his counsel. To be sure, given that the police falsely told Montejo that he did not have counsel, the facts of this case are sufficiently extreme to establish circumvention under any conception of the Sixth Amendment. But other cases will require courts to assess more subtle forms of circumvention, injecting needlessly "[u]ncertainty, unpredictability, burden, and expense" into prosecutions, adjudications, and plea bargains. Former Prosecutors and Judges Br. 12.

Jackson's bright line rule avoids all of these problems and would be preferable even as a matter of first impression. As a question of *stare decisis*, the argument for overruling *Jackson* on administrability grounds could not be weaker. *Cf. Arizona v. Gant*, No. 07-542, 2009 WL 1045962, at *17-18, --- S. Ct. --- (Apr. 21, 2009) (Alito, J., dissenting) (arguing against overruling rule of criminal procedure that was workable and relied upon by law enforcement).

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terminates when there has been a break in custody or a significant lapse in time before the re-initiation of custodial interrogation." U.S. Br. 7 n.1.

II. *Jackson* Protects The Sixth Amendment Right To The Assistance Of Counsel, Not The Fifth Amendment Guarantee Against Coerced Self-Incrimination.

Given the *Jackson* rule's conceded practical desirability, Louisiana faces a heavy burden to show that the rule is so unreasonable that it nevertheless should now be abandoned. It has not come close to carrying that burden. The *Jackson* rule serves distinct Sixth Amendment values, and it fits within a vital line of Sixth Amendment jurisprudence stretching before and after *Jackson* that recognizes that the police may not bypass a defendant's counsel.

A. The *Jackson* Rule Is Correct.

The argument that *Jackson* should be overturned flows entirely from the mistaken premise that the *Jackson* rule is intended to protect against coercion within the meaning of the Fifth Amendment. Resp. Supp. Br. 3-13. But the *Jackson* rule does not concern the Fifth Amendment at all. Rather, it is a straightforward implementation of the Sixth Amendment's distinct textual guarantee of a defendant's right "to have the assistance of counsel" at critical stages of his defense. Petr. Supp. Br. 2-9; *McNeil*, 501 U.S. at 179 (explaining that the *Jackson* rule "rejects any equivalence" between Fifth and Sixth Amendment rights).

Louisiana ignores this distinction, relying on *Patterson v. Illinois*, 487 U.S. 285 (1988), to argue that *Miranda* warnings are a sufficient substitute for the assistance of counsel. Resp. Supp. Br. 20. But

Patterson itself recognized that its waiver analysis applies only in the gap between the commencement of adversarial proceedings and the point where counsel is secured or requested: "Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." *Patterson,* 487 U.S. at 290 n.3. Thus, *Patterson* did not implicate the core Sixth Amendment violation that arises when the State circumvents the defendants' counsel after former adversarial proceedings have been initiated. *A fortiori*, *Patterson* did not address whether a purported waiver obtained by circumventing the defendant's counsel is enforceable. Rather, *Patterson* concerned the question whether, in the absence of such circumvention, the government must use some set of "magic words" beyond *Miranda* to obtain a waiver. In answering no, the Court relied heavily on the defendant's failure in that case to identify any prejudice under those circumstances. *Id.* at 295.

The *Jackson* rule applies, however, where a defendant *does* have counsel – or at least has requested counsel – after formal adversarial proceedings have commenced. A purported waiver obtained in those circumstances could only be obtained by circumventing counsel. And such circumvention plainly results in significant prejudice in violation of the Sixth Amendment. The *Jackson* rule thus recognizes that a waiver obtained from a defendant only by circumventing his counsel – and thus by violating the Sixth Amendment – cannot be enforced.

The vast majority of criminal cases are resolved by guilty pleas, and sentencing is substantially affected by the nature and scope of the defendant's cooperation with the government. Thus, post-charge encounters between the accused and the government are always effectively a part of the adversary process by which guilt is determined, the scope of the crimes is defined, and punishment is meted out. The fact that these out-of-court interactions take place through negotiation rather than adjudication does not change their fundamental character as adversarial attempts to resolve formal legal charges. Such negotiations require an intricate knowledge of the elements of substantive crimes, possible lesser offenses, and sentencing factors, as well as a familiarity with the processes that surround these negotiations. For example, the functions of defense counsel during post-charge communications between the government and the defendant include, *inter alia*, "mak[ing] certain that admissions are complete..., explaining to defendants the significance of facts that can diminish their culpability ... and facilitating a downward departure or other sentencing relief for cooperating with the government." Crim. Just. Inst. of Harvard Law School ("CJI") Br. 10-11. In short, they require expertise in the type of "complex legal technicalities" in which an "unaided layman ha[s] little skill." *United States v. Ash*, 413 U.S. 300, 307 (1973).

Moreover, the presence of counsel at a post-charge interview benefits both parties by facilitating prompt administration of justice. CJI Br. 10. The defendant who decides to "go it alone" in the face of police questioning may do so because he believes it is in his best interest to lie or be hostile. A lawyer will advise him to be more forthcoming in light of the importance of cooperation for plea bargains and sentencing. *Id.*[3]

A *Miranda* warning serves as a prophylactic against coercion. But it plainly does not provide the "assistance of counsel" that the Sixth Amendment guarantees during critical stages, including post-charge interviews. When the police bypass a defendant's counsel to seek an uncounseled confrontation with the defendant, they have deprived him of that assistance. To be sure, nothing in *Jackson* prevents a defendant from clearing his conscience and speaking with the police of his own accord. *Texas v. Cobb*, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring). As this Court has long recognized, "the right to assistance of counsel may be waived, after it has attached, without notice to or consultation with counsel" but only where the defendant has "freely, on his own initiative, confessed" and the police have "refrained from coercion and interrogation" outside the lawyer's presence. *Brewer*, 430 U.S. at 413 (Powell, J., concurring). But no purported waiver of the Sixth Amendment right to assistance of counsel is enforceable when it is obtained through the circumvention of that very right, as occurred here.

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[3] Indeed, a defendant who goes it alone may end up giving a false confession in the face of questioning by an expert adversary. *Cf.* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. (forthcoming 2009), *available at* http://ssrn.com/abstract=1280254, at 1 ("[P]ost-conviction DNA testing has now exonerated 232 convicts, 34 of whom falsely confessed to rapes and murders"). These concerns are particularly great where the defendant is a juvenile or has diminished mental capacity. *See* NACDL Br. 12-14.

B. The Foundations Of The *Jackson* Rule Have Not Been Eroded.

Nor is there is any argument that the *Jackson* rule's foundations have been eroded by subsequent case law. To the contrary, *Jackson* is situated in a long line of cases recognizing that the prosecution may not bypass a defendant's counsel and initiate contact with the defendant after the right to counsel has attached. Long before *Jackson*, in *Brewer v. Williams*, this Court held that when a defendant has been formally charged and has counsel, statements made after a *Miranda* warning but outside the presence of the defendant's lawyer could not be admitted under the Sixth Amendment. 430 U.S. at 397-98 ("There is no need to review … the doctrine of *Miranda v. Arizona*, a doctrine [concerning] compulsory self-incrimination [because the defendant] was deprived a different constitutional right – the right to … counsel"). Likewise, in *Moran v. Burbine*, issued just prior to *Jackson*, this Court "readily" acknowledged that the Sixth Amendment would not permit the police to question a *Mirandized* defendant outside the presence of his attorney while his attorney was trying to reach him. 475 U.S. 412, 428 (1986) (citing *Brewer*).

Jackson itself involved an application of these principles to a special case in which a defendant had invoked his right to counsel, but apparently did not yet have a lawyer. 475 U.S. at 627-28[4] But what is now known as the *Jackson* rule applies not just in the unusual circumstances of *Jackson* itself, but also in the long-recognized heartland of Sixth Amendment cases – like this one – in which the defendant actually *has* a lawyer but the police circumvent the defendant's counsel. *E.g., Michigan v. Harvey*, 494 U.S. 344, 349 (1990) (referring to *Jackson* in a case in which defendant actually had counsel) From *Brewer* on, the heartland "*Jackson*" cases have been ones likesthis in which the police have bypassed appointed or retained counsel to interrogate a defendant. This Court has consistently recognized that such tactics are improper under the Sixth Amendment. *McNeil*, 501 U.S. at 179; *Cobb*, 532 U.S. at 167-68. *Cf. Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2590 (2008) ("*Jackson* refutes the [] argument that Fifth Amendment protections at the early stage obviate attachment of the Sixth Amendment right at initial appearance.").

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[4] In light of the peculiar circumstances of *Jackson* in which the defendant had *requested* a lawyer but did not yet have one, the Court drew an analogy to the Fifth Amendment *Edwards* rule, which likewise turns on a request by the defendant. But the unbroken line of "*Jackson*" cases from *Brewer* on make perfectly clear that a purported waiver is invalid under the in the present circumstances because it is obtained by circumventing the "assistance of counsel" guaranteed by the Sixth Amendment – not because of any violation of the Fifth Amendment's voluntariness protections. In any case, as both *Jackson* and *Edwards* recognized, once the Sixth Amendment right to counsel has attached, no invocation of that right is necessary to secure its protection. *Jackson*, 475 U.S. at 633 n.6; *Edwards v. Arizona*, 451 U.S. 477, 480 n.7 (1981).

Louisiana is thus incorrect to argue that the *Jackson* rule has been undermined by three later precedents. *Contra* Resp. Supp. Br. 9-13. *Davis v. United States*, the first case Louisiana cites, is a Fifth Amendment case that has nothing to do with the Sixth Amendment *Jackson* rule. The second and third cases, *McNeil* and *Patterson* are even less helpful to Louisiana because they explicitly reaffirmed *Jackson*. In ruling that *Jackson* was offense-specific, *McNeil* reiterated that the police could *not* have confronted the defendant outside the presence of his lawyer concerning the charge for which his Sixth Amendment right had attached. 501 U.S. at 179. And, as noted above, *Patterson* held that a defendant who had not requested counsel could waive his Sixth Amendment rights, but, critically, stated that "the analysis changes markedly once an accused even requests the assistance of counsel." 487 U.S. at 290 n.3.

In sum, the necessary special justification for overturning *Jackson* is absent given the Court's strong reaffirmation of *Jackson*'s rule.

III. Montejo Should Prevail Under Even Lousiana's View Of The Sixth Amendment.

Even under Louisiana's view of the Sixth Amendment, Montejo's interrogation was unconstitutional. The police secured initial statements from Montejo by interrogating him through the night. When he initially asked for a lawyer, the police told him "you don't want to talk to us no more, you want a lawyer, right? I trusted you and you let me down. . . . You've asked for an attorney, and you are getting your charge. And the shame of it is . . .." Petr. Br. 4. The police then turned off the video-tape for a period of time, after which Montejo came on camera, asked to speak to the police, and then made additional salient admissions. *Id.* 4-5

After providing these admissions, Montejo insisted that he would not take charge for something he did not do. *Id.* 5. The officers ultimately waited four days to bring Montejo into court, where he was finally appointed a lawyer. *Id.* 6.

Shortly afterwards, the police removed Montejo from the jail. *Id.* 7-8. When Montejo asked about his counsel, the police told him that he did not have a lawyer and gave him a *Miranda* warning.[5] *Id.* 8. The inaccurate *Miranda* warning suggested Montejo could get a lawyer in the future rather than informing him that he had a lawyer who in fact was trying to reach him. After securing a confession used to convict and sentence Montejo to death, the police returned to the jail and found his irate lawyer. *Id.* 9-10.

Louisiana concedes that even absent *Jackson* the Sixth Amendment will still bar circumvention of counsel. Resp. Supp. Br. 3; *see Missouri v. Seibert*, 542 U.S. 600, 618 (2004) (Kennedy, J., concurring in judgment). In this case, the conviction and death sentence were predicated on evidence secured by the police officers' circumvention of the adversarial process. No plausible view of the Sixth Amendment supports the result below, and thus this Court should reverse even if it chooses to overturn *Jackson.*

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[5] Putting aside the veracity of the police's account of the events, it is undisputed that the police officers never told Montejo that he had counsel.

CONCLUSION

This Court should not overrule *Michigan v. Jackson*, and the judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

JELPI P. PICOU
G. BEN COHEN
ROBERT J. SMITH
THE CAPITAL APPEALS
PROJECT
636 BARONNE STREET
NEW ORLEANS, LA 70113
(504) 529-5955

PAUL M. SMITH
Counsel of Record
WILLIAM M. HOHENGARTEN
MATTHEW S. HELLMAN
ADAM G. UNIKOWSKY*
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001
(202) 639-6000

*Not admitted in DC; supervised by principals of the firm

REPLY
BRIEF

125

(23)

No. 07-1529

FILED
APR 2 4 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

JESSE JAY MONTEJO,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the
Louisiana Supreme Court

SUPPLEMENTAL REPLY BRIEF FOR RESPONDENT

JAMES D. "BUDDY" CALDWELL
LOUISIANA ATTORNEY GENERAL
S. KYLE DUNCAN
APPELLATE CHIEF
LOUISIANA DEPARTMENT OF JUSTICE

POST OFFICE BOX 94005
BATON ROUGE, LA 70804
(225) 326-6765

KATHRYN LANDRY
Counsel of Record
WALTER P. REED
HOUSTON C. GASCON, III
SCOTT C. GARDNER
ST. TAMMANY PARISH
DISTRICT ATTORNEY'S OFFICE

POST OFFICE BOX 82659
BATON ROUGE, LA 70884
(225) 766-0223

Counsel for Respondent State of Louisiana

April 24, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

SUPPLEMENTAL QUESTION PRESENTED

Should *Michigan v. Jackson*, 475 U.S. 625 (1986), be overruled?

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ARGUMENT

I. OVERRULING *JACKSON'S* OBSOLETE RULE WILL CLARIFY SIXTH AMENDMENT JURISPRUDENCE AND PRACTICE.

Without actually defending its reasoning, Montejo claims that *Michigan v. Jackson* "is fully consistent with the Court's Fifth and Sixth Amendment decisions over ... nearly a quarter century." Pet'r Suppl. Br., at 15. That is stunningly wrong. As Louisiana's Supplemental Brief explains, subsequent decisions have left *Jackson* in tatters:

- *Jackson* said an indictment created "even stronger" reasons for barring questioning of an uncounseled accused, 475 U.S. 625, 631 (1986), but *Patterson v. Illinois* soon after explained an indictment "does not substantially increase the value of counsel ... or expand [his] limited purpose ... when the accused is questioned by authorities." 487 U.S. 285, 298 (1988).

- *Jackson* broadly construed a request for counsel to trigger *Edwards* and bar subsequent waivers, 475 U.S., at 633, but *Davis v. United States* then narrowly construed the same *Edwards* request. 512 U.S. 452, 459-61 (1994).

- *Jackson* interpreted a Sixth Amendment invocation to include a Fifth Amendment request for counsel, 475 U.S., at 632-33, but *McNeil v. Wisconsin* later explained that invoking the Sixth "is, as a matter of *fact, not*

> to invoke the [Fifth Amendment] interest." 501 U.S. 171, 178 (1991).

See also Resp't Suppl. Br., at 6-13. These cases do not "clarif[y] the scope of [*Jackson*'s] rule," Pet'r Suppl. Br., at 17. They clarify that *Jackson*'s rule has been orphaned.

Jackson's erosion has not occurred in secret.[1] Moreover, what was being eroded was *Jackson*'s already brittle foundation in Fifth Amendment anti-coercion jurisprudence. Importing those concerns into the Sixth Amendment "ma[de] no sense at all," *Jackson*, 475 U.S., at 640 (Rehnquist, J., dissenting), as other Justices have since recognized. *See Texas v. Cobb*, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring) (discussing *Jackson*'s subversion of *Edwards*); *see also* Resp't Suppl. Br., at 6-9.

Understandably, Montejo avoids explaining why "subsequent cases have [not] undermined [*Jackson*'s] doctrinal underpinnings." Pet'r Suppl. Br. at 15 (quoting *Dickerson v. United States*, 500 U.S. 428, 443 (2000)). Instead, Montejo defends *Jackson* on grounds of policy and practicality. Part II *infra* explains why Montejo's policy arguments fail. The remainder of this Part explains why overruling *Jackson* will not "create a host of difficulties that would cloud the Sixth Amendment for years to come," Pet'r Suppl. Br., at 9, but will instead clarify the Sixth Amendment.

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[1] *See, e.g., Patterson*, 487 U.S., at 305-06 & n.3 (Stevens, J., dissenting) (arguing the majority "backs away from the significance previously attributed to the initiation of formal proceedings," citing, *inter alia, Jackson*); *McNeil*, 501 U.S., at 185 (Stevens, J., dissenting) (arguing majority's "approach of construing ambiguous requests for counsel ... is the opposite of that taken in *Jackson*"); *Davis*, 512 U.S., at 469-70 (Souter, J., concurring) (criticizing majority because "requests for counsel [should] be 'give[n] a broad, rather than a narrow, interpretation,'" quoting *Jackson*).

Montejo argues that overruling *Jackson* will (1) raise "innumerable questions" about whether a defendant has sufficiently invoked *Edwards* at an arraignment (*id.*, at 10); (2) proliferate variations on *Miranda* waivers for different Sixth Amendment situations (*id.*, at 11-12); and (3) encourage police to undermine the Sixth Amendment by "try[ing] to reach defendants before they have had a chance to consult with counsel" (*id.*, at 13-14). These arguments exaggerate the consequences of abandoning *Jackson*.

Montejo is wrong that overruling *Jackson* would "replace [*Jackson*] with a Fifth Amendment rule designed to protect a completely different constitutional right." *Id.*, at 17. That is backwards. It was *Jackson* itself that dragged into the Sixth Amendment the *Edwards* rule—a "rule designed to protect a completely different constitutional right." *Id.* *Jackson* itself transplanted *Edwards* from its native interrogation environment into a context divorced from a "suspect's choice to speak with investigators." *Cobb*, 532 U.S., at 176 (Kennedy, J., concurring). And, finally, *Jackson* itself pegged its new rule to a fortuitous request for counsel that, as *McNeil* taught, does not implicate the Fifth Amendment. 501 U.S., at 178. Consequently, overruling *Jackson* would not "replace" its illogical rule with *anything*, but would rather "bring[] [the Court's] Fifth and Sixth Amendment jurisprudence into a logical alignment." *Id.*, at 183 (Kennedy, J., concurring).

Montejo's warnings thus ring hollow. First, courts will not face "innumerable questions" about a possible *Edwards* request at arraignment, because *Jackson*'s demise will remove the need to reach such questions. No longer could an accused potentially trigger *Edwards* in the alien context of an arraignment. That would be a wholesome development, since the Court has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'" *McNeil*, 501 U.S., at 182 n.3 (citations omitted). By restoring the principle that "[m]ost rights must be asserted when the government seeks to take the action they protect against," *id.*, discarding *Jackson* would clarify rather than complicate arraignments.

Second, *Patterson* answers Montejo's fear that overruling *Jackson* would multiply *Miranda* variations. *Patterson* held that, for waiver-of-counsel purposes, pre- and post-indictment suspects occupy the same position. 487 U.S., at 298-99. Thus, standard *Miranda* warnings "convey[] ... the sum and substance of the rights that the Sixth Amendment provide[s]." *Id.*, at 293. That is because counsel's "simple," "limited" and "unidimensional" role during questioning merits "a waiver procedure ... likewise simple and limited." *Id.*, at 294 n.6, 298-300.[2]

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[2] *Patterson* did not involve "a completely different situation," Pet'r Suppl. Br. at 11 n.3, because the accused had not retained or accepted counsel. *Patterson* pointed that out—not to suggest that a different waiver standard would apply—

Moreover, *Patterson* rejected lower courts' "suggest[ions] that something beyond *Miranda* warnings is ... required" to validate a Sixth Amendment waiver during questioning. *Id.*, at 294-95 & n.8. *Patterson* thus forecloses Montejo's "rather nebulous suggestion" to the contrary. *Id.*, at 294. Since *Jackson* applies only to questioning, one need not speculate about waivers in other situations—although the Court could readily formulate them in future cases. *Cf. Patterson,* 487 U.S., at 298.

Finally, Montejo suggests that overruling *Jackson* will "condition Sixth Amendment protections on the outcome of a race between the police and appointed defense counsel to meet with the defendant." Pet'r Suppl. Br., at 13. But retiring *Jackson* will not touch the Sixth Amendment's *substantive* protections. Counsel will still be guaranteed at critical stages, a guarantee buttressed by the "anti-subversion" protection of *Massiah* and by *Miranda-Edwards*. *See* Resp't Suppl. Br., at 22-25. What will change is *procedural*: *Jackson* will no longer presumptively invalidate free and informed waivers. The notion that there is something suspect about the police candidly seeking such waivers is based on a warped notion of counsel's Sixth Amendment role. *See* Resp't Suppl. Br., at 13-22.

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but to clarify it was not addressing a *Moulton* situation (where no waiver is *possible*) nor a *Jackson* situation (where any waiver is *presumptively invalidated*). *See Patterson*, 487 U.S., at 290 n.3; *Maine v. Moulton*, 474 U.S. 159, 163-66, 172-74 (1985).

II. *JACKSON* DOES NOT RATIONALLY FURTHER DISTINCT SIXTH AMENDMENT INTERESTS.

Montejo then flees to policy. He argues *Jackson* furthers an accused's "distinct" Sixth Amendment "right 'to rely on counsel as a "medium" between him and the State.'" Pet'r Suppl. Br., at 3 (quoting *Maine v. Moulton*, 474 U.S. 159, 176 (1985)). Louisiana agrees with Montejo that "[t]he Fifth and Sixth Amendments protect an accused in distinct ways." Resp't Suppl. Br., at 1. But, from that premise, Louisiana draws the opposite conclusion about *Jackson*. *Jackson* imported a Fifth Amendment anti-coercion rule that distorts counsel's Sixth Amendment role as a "guide through complex legal technicalities," *id.*, at 14 (quoting *United States v. Ash*, 413 U.S. 300, 307 (1973)), and exaggerates counsel's "simple and limited" role during questioning. *See Patterson*, 487 U.S., at 300; Resp't Suppl. Br., at 13-18, 18-22. In short, Sixth Amendment counsel is supposed to be an accused's expert mouthpiece, but *Jackson* turned him into a muffler.

Montejo's policy defense of *Jackson* rests on Sixth Amendment boilerplate, failing even to recognize counsel's variable Sixth Amendment roles at different critical stages. *See generally Patterson*, 487 U.S., at 298-99. Instead he simply defends precedents such as *Moulton*, *Massiah*, and *Henry*, mistakenly fearing them threatened by overruling *Jackson*. *See, e.g.,* Pet'r Suppl. Br., at 12 (warning that "*Henry* and *Moulton* ... should arguably come out the other way"); *Massiah v. United States*, 377 U.S. 201 (1964); *United States v. Henry*, 447 U.S.

264 (1980). But Montejo misses that *Jackson* illogically *extends* those "surreptitious investigation" cases into a context where "the conduct of the police was totally open and aboveboard." *Jackson*, 475 U.S., at 641 n.4 (Rehnquist, J., dissenting). Overruling *Jackson* would not affect them. *See* Resp't Suppl. Br., at 3, 23.[3]

Finally, *amici* Public Defender Service *et al.* make a version of Montejo's policy argument by urging that *Jackson* is also supported by "no-contact" ethics rules. *See* Suppl. Br. of *Amici Curiae* Public Defender Service *et al.* ("Public Defender Br."), at 12-16.[4] But there are numerous problems with pegging Sixth Amendment protections to the "sub-constitutional recommendations of even so esteemed a body as the American Bar Association." *Moran*, 475 U.S., at 427-28. First, since ethical rules "vary in scope" across jurisdictions, *see* Public Defender Br., at 16 n.4, they would provide an unstable guide for constitutional law. Second, applying "no-contact" rules here would undermine *another* Sixth Amendment principle whose validity is admitted. Both Montejo and *amici* agree that the Sixth Amendment allows an accused to "come forward and confess to the police of his own accord." Pet'r Suppl. Br., at 14; *see also* Public Defender Br., at 11 (admitting that accused "can always ... initiate contact" with the police). But the ABA no-contact rule would swallow that principle since it "applies even though the represented person initiates or consents to the communication." ABA Rule 4.2, cmt. 3.

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[3] Montejo also suggests that *Massiah et al.* separately invalidate his Sixth Amendment waiver. Pet'r Suppl. Br., at 18-23. But, as explained in Part III *infra*, Montejo lost that claim below and it is not properly before this Court.

[4] Specifically, *amici* refer to ABA Model Rule of Professional Conduct 4.2 (Feb. 2009), which prohibits a lawyer and his agents, unless otherwise authorized, from "communicat[ing] about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter."

Most importantly, the Court rejected this argument eight years ago in *Texas v. Cobb*. Declining the dissent's suggestion to use ABA Rule 4.2 to expand the Sixth Amendment, the Court explained that "[e]very profession is competent to define the standards of conduct for its members, but such standards are obviously not controlling in interpretation of constitutional provisions." *Cobb*, 532 U.S., at 171 n.2.

III. THIS CASE SQUARELY POSES WHETHER *JACKSON* SHOULD BE OVERRULED.

This is the right case to overrule *Jackson*, because application of *Jackson*'s anti-waiver rule would invalidate Montejo's post-indictment admission, made after he had properly waived his Sixth Amendment right to counsel under *Patterson*. *See State v. Montejo*, 974 So.2d 1238, 1258-62 (La. 2008).[5] That admission—a written apology to the victim's wife—corroborated other damning evidence against Montejo, including a lengthy "video-taped police interrogation during which Montejo ... admitted that he shot the victim who had unexpectedly returned home and interrupted Montejo's burglary." *Id.*, at 1244.[6] The Louisiana Supreme Court exhaustively analyzed Montejo's Fifth Amendment waivers during the videotaped statements and found them valid under *Miranda*, *Edwards*, and *Oregon v. Bradshaw*. *See id.*, at 1250-58; *id.*, at 1252-54 (discussing *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (plurality opinion)).

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[5] Of course, the Court could resolve the case on the narrower ground that, beyond mutely accepting appointed counsel, Montejo made no "assertion" sufficient to trigger *Jackson*. *See* Resp't Br., at 10-16. But that would leave *Jackson*'s anomalous rule in place. Moreover, while *Jackson* plainly requires a positive "assertion," by continuing to refine that requirement the Court will inevitably confront, in future

This Court originally granted certiorari only to address whether Montejo's silent acceptance of appointed counsel at a 72-hour hearing was enough to trigger *Jackson*. *See* 129 S. Ct. 30 (U.S. Oct. 1, 2008). The validity of Montejo's Fifth Amendment waivers is thus not before the Court. Nor is the question whether Montejo's subsequent Sixth Amendment waiver was valid under *Moran v. Burbine*, which protects (in a way distinct from *Jackson*) the Sixth Amendment counsel right against certain forms of police "interference." *See* 475 U.S. 412, 428 (1986). On the latter issue, the Louisiana Supreme Court noted the facts were unclear about what transpired between Montejo and police investigators on September 10, the morning of Montejo's Sixth Amendment waiver and

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cases, the kinds of record ambiguities and factual disagreements posed here. Better to discard *Jackson*.

[6] The State also proved "the undisputable presence of Montejo's DNA under the victim's fingernails," and its expert "ruled out DNA transfer by coincidental contact." *Id.*, at 1242.

subsequent admission.[7] But the court left those factual matters unresolved, reasoning that, "[e]ven if ... the police did tell [Montejo] he did not have a lawyer, this does not rise to the level of the facts presented in *Moran v. Burbine*." 974 So.2d, at 1262 n.69.

Montejo can claim this case is a "poor vehicle" for reconsidering *Jackson* only by re-arguing those Fifth and Sixth Amendment issues not even before this Court. Thus, he says allegedly "harsh tactics" should have invalidated his *Miranda* waivers during the videotaped interviews. Pet'r Suppl. Br., at 18-19. But the Louisiana Supreme Court found, to the contrary, that Montejo's initial *Miranda* invocation was "scrupulously honored." 974 So.2d, at 1254-55. The court found further that Montejo validly retracted his initial request for counsel, *id.*, at 1256, and later "validly waived his *Miranda* rights before the resumption of the interview." *Id.*, at 1258. Montejo cannot use his disagreement with the Louisiana Supreme Court on these issues—which, again, are not before this Court—to avoid the distinct *Jackson* issue that *is* squarely posed.

Montejo also raises the different Sixth Amendment claim that the police lied about whether he had appointed counsel and thus "interfered" with his Sixth Amendment right under *Moran*, 475 U.S., at 428-29. Pet'r Suppl. Br., at 19-21. But, as explained above, the Louisiana Supreme Court expressly declined to resolve factual issues about what actually happened, merely stating in *dicta* that Montejo's allegations, even if true, did "not rise to the level of ... *Moran*." 974 So.2d, at 1262 n.69.[8] That is a far cry from Montejo's bald assertion that "it is undisputed the police did not tell Montejo that he had counsel." Pet'r Suppl. Br., at 19-20 n.8. Montejo's version of the facts was contested at every step of this case, and has never been adopted by any court. More to the point, this unresolved factual dispute concerning a claim *not before this Court* is no reason to avoid the *Jackson* issue that assuredly *is*.

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[7] Montejo testified that he told the police he had appointed counsel and that the police said he did not. By contrast, one of the detectives testified that he was unaware that Montejo had received appointed counsel that morning and, more importantly, that Montejo "told him he had not been contacted by an attorney." *See* 974 So.2d, at 1261-62.

Furthermore, the record discloses how speculative Montejo's alternate *Moran* claim is. Aside from Montejo's self-serving assertion, there is no evidence that on the morning of September 10 the two detectives deliberately conspired to deceive Montejo about the status of his appointed counsel. To the contrary, there was evidence that, although fully advised of his rights multiple times that morning (JA, p. 67), Montejo *himself* denied he had or wanted counsel when asked by the officers. JA, pp. 82, 145, 179-80, 182. Montejo's tale of police "deceit" came out, not at his suppression hearing, but at the end of trial. By contrast, Montejo's motion to suppress simply argued that all his statements were involuntary, JA, p. 6, *not* that the police had deceived him. JA, pp. 92-93.

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[8] Montejo wrongly claims that the Louisiana Supreme Court "reason[ed] ... that the police would have been *permitted to lie* about the status of Montejo's counsel under this Court's decision in *Moran*." Pet'r Suppl. Br., at 19-20 n.8 (emphasis added). The court did no such thing.

Montejo was a murder suspect with an extensive criminal record, who waived his rights no less than seven times. *See* JA, p. 13; ex. MTS1-7. Prior to the 72-hour hearing, he had already confessed on videotape. Thus, Montejo had a clear motive to accompany the detectives on September 10: he wished to show he had not intended to commit murder, but had only armed himself with the victim's gun once inside the home. Montejo hoped to prove this theory by finding the gun. JA, p. 51.

Montejo, then, was precisely that suspect who chooses to "go it alone" with the police. *See Patterson*, 487 U.S., at 291. He hoped to "avoid the laying of charges by demonstrating an assurance of innocence"—or at least a lesser degree of guilt—"through frank and unassisted answers to questions." *McNeil*, 501 U.S., at 178. To that end, Montejo freely and knowingly waived his Sixth Amendment right to counsel. Far from a "poor vehicle" to reconsider *Jackson*, this is the paradigm case. Here, "the *Edwards* rule operate[d] to preserve [Montejo's] free choice to remain silent," or to talk to police outside counsel's presence. But "if *Jackson* were to apply it would override that choice." *Cobb*, 532 U.S., at 175 (Kennedy, J., concurring).

CONCLUSION

The Court should overrule *Michigan v. Jackson.*

Respectfully submitted,

JAMES D. "BUDDY" CALDWELL
Louisiana Attorney General
S. KYLE DUNCAN
Appellate Chief
Louisiana Department of Justice

Post Office Box 94005
Baton Rouge, LA 70804
(225) 326-6765

KATHRYN LANDRY
Counsel of Record
WALTER P. REED
HOUSTON C. GASCON, III
SCOTT C. GARDNER
St. Tammany Parish District Attorney's Office

Post Office Box 82659
Baton Rouge, LA 70884
(225) 766-0223

April 24, 2009

AMICUS
CURIAE
BRIEF

125 (20)

Supreme Court, U.S.
FILED

APR 14 2009

OFFICE OF THE CLERK

No. 07-1529

IN THE

Supreme Court of the United States

JESSE JAY MONTEJO,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

BRIEF OF*AMICUS CURIAE* THE CRIMINAL JUSTICE INSTITUTE OF HARVARD LAW SCHOOL

MILES EHRLICH	STEPHEN SINGER
Ramsey and Ehrlich, LLP	Loyola Law School
803 Hearst Avenue	7214 St. Charles Av
Berkeley, Ca. 94710	New Orleans, La. 70118

Ronald S. Sullivan,* Director,
Harvard Criminal Justice Institute
301 Austin Hall, 1515 Massachusetts Avenue,
Cambridge, MA 02138
(617) 496-8143

*Counsel of Record for Amicus Curiae

April 14, 2009

BATEMAN & SLADE, INC   BOSTON, MASSACHUSETTS

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QUESTION PRESENTED

Whether *Michigan v. Jackson*, 475 U.S. 625 (1986), should be overruled.

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INTERESTS OF *AMICUS CURIAE*

The Criminal Justice Institute of Harvard Law School is the pre-eminent teaching institution concerning the provision of defense services to indigent defendants. In addition to clinical programs, the Criminal Justice Institute pursues various criminal justice initiatives and engages in broader public education, in areas of constitutional law, research, practice and policy. Through direct advocacy, policy briefing, and as an *amicus curiae*, the Criminal Justice Institute addresses the role of defense counsel under the Sixth Amendment.

The Criminal Justice Institute submits this brief urging the Court to maintain the protections articulated in *Michigan v. Jackson*, 475 U.S. 625 (1986).

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[1] On March 27, 2009, this Court issued an order in *Montejo v. Louisiana*, 07-1529, directing the parties to address the question: "Should *Michigan v. Jackson*, 475 U.S. 625 (1986), be overruled." The order provided that "Amicus briefs, not to exceed 4,500 words, may be filed with the clerk and served upon counsel on or before 2 p.m. Tuesday, April 14, 2009." No person or entity, other than *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

I. THE FIFTH AND SIXTH AMENDMENTS PROTECT DIFFERENT INTERESTS – REQUIRING DIFFERENT, RATHER THAN UNIFORM OR ALIGNED, RULES.

In *Michigan v. Jackson,* this Court recognized the distinct role of the Sixth Amendment, holding that once a defendant's right to counsel has attached, the government may not initiate contact with the defendant to secure an uncounseled waiver of rights. 475 U.S. 625 (1986). *See also McNeil v. Wisconsin,* 501 U.S. 171 (1991) (noting distinction between exercise of Fifth Amendment rights and the protections offered by the Sixth Amendment).[2]

There is no question that *Jackson* provides an easily administered bright-line framework.[3] Concern has been expressed, however, about whether *Jackson* interferes with the exercise of free will by defendants,[4] and whether this Court's Fifth and Sixth Amendment jurisprudence need to be brought into "alignment."[5]

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[2] *See id.* at 179 ("The State in *Jackson* opposed [the rule adopted by the Court] on the ground that assertion of the Sixth Amendment right to counsel did not realistically constitute the expression (as *Edwards* required) of a wish to have counsel present during custodial interrogation. . . . Our response to that contention was not that it did constitute such an expression, but that it did not have to, since the relevant question was not whether the *Miranda* "Fifth Amendment" right had been asserted, but whether the Sixth Amendment right to counsel had been waived.")

[3] No one seriously disputes *Jackson*'s clear guidance for law enforcement and litigants, or its ease of application for courts. No scholarly criticism of *Jackson* exists, no bar associations have called for its demise, no lower courts have complained that the rule has become burdensome or unfair. Indeed, it appears that, before this Court's briefing order, no party to this case ever urged its reversal.

The *Jackson* rule does not attempt to align Fifth and Sixth Amendment jurisprudence. Rather, it reflects the critical distinction between the Fifth and Sixth Amendments, and the fundamentally different interests they protect. The Fifth Amendment is primarily a safeguard against government coercion during the pre-charge, investigatory phase. The Sixth Amendment, on the other hand, protects the integrity of the adversarial process more broadly, by ensuring, after the initiation of adversarial proceedings, that a defendant be allowed to receive and consider the advice of counsel at all critical stages.[6]

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[4] See *Texas v. Cobb*, 532 U.S. 162, 174-77 (2001) (Kennedy, J., concurring) (suggesting that *Jackson* "bar[s] an accused from making an initial election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone," "supersedes the suspect's voluntary choice to speak with investigators," and functions to "invalidate a confession given by the free choice of suspects who have received proper advice of their Miranda rights but waived them nonetheless.").

[5] *See McNeil v. Wisconsin*, 501 U.S. 171, 183 (1991) (Kennedy, J., *concurring*) ("Having adopted an offense-specific rule for invocation of the Sixth Amendment right to counsel, the Court should devote some attention to bringing its Fifth and Sixth Amendment jurisprudence into a logical alignment, and should give uniform, fair, and workable guidelines for the criminal justice system.").

[6] In *Miranda*, the Court used a Sixth Amendment "tool" (the offer of counsel) to resolve a Fifth Amendment concern. But in doing so, the Court did not seek to eliminate or

The difference between the investigatory phase, where the Fifth Amendment governs police encounters, and adversarial proceedings, where the Sixth Amendment applies, is important.[7] After adversarial proceedings have been initiated, the position of the government has solidified into that of a formal adversary, largely antagonistic to the interests of the defendant – and thus, it is here, in the context of a pending *prosecution*, that the role of counsel becomes essential.[8]

At this point, the constitutional rules are not simply addressed to the voluntariness of a statement or the absence of coercion. They are addressed, instead, to the fundamental integrity and fairness of the adversarial system and to a broader sense of procedural fair play. Aside from the ultimate decision whether to plead guilty, there is perhaps no more critical stage in a criminal prosecution than a post-attachment encounter between a defendant and the government. Indeed, compared to the rather modest value of an attorney at a post-arraignment lineup or psychiatric evaluation – two occasions in

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reformulate the broader protections of the Sixth Amendment in the context of formal adversarial proceedings.

[7] *See Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2583 (2008) ("The rule is not "mere formalism," but a recognition of the point at which "the government has committed itself to prosecute," "the adverse positions of government and defendant have solidified," and the accused "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.").

[8] Hence, the text of the Sixth Amendment reads, "In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of counsel for his defence." United States Constitution Amendment VI.

which this Court has held the Sixth Amendment to require the participation of counsel – counsel has a far more critical and essential role to play in the context of a post-attachment meeting between a defendant and the government.

Moreover, consideration of the practical realities surrounding post-attachment interviews demonstrates that the involvement of counsel in the process does not impede, but rather enhances, a defendant's informed exercise of free will, while also promoting the integrity of the adversarial process and the fair and efficient administration of justice.

II. *JACKSON* PROMOTES THE AUTONOMY INTERESTS OF THE ACCUSED.

Jackson does not interfere with the free choice of the accused to make a confession or speak with government investigators. *Jackson* (like *Edwards v. Arizona*) only limits government-initiated questioning. *Jackson*, 475 U.S. at 637. Thus, whether or not he has discussed the issue with counsel, a defendant always retains the autonomy to initiate contact with the government and to confess or explain his conduct. *Id.* But in the Sixth Amendment context, where the positions of the parties have solidified into formal adversaries, *Jackson* simply ensures that any waiver of rights at this critical-stage encounter with the government be done with the advice of counsel.

Not only is a defendant free to initiate communication with the government at any time, but of course, under *Jackson*, a defendant may also respond to government-initiated communication with the assistance of counsel. In this context, the provision of counsel furthers, rather than frustrates, a defendant's free will because it helps ensure that the decision is an *informed* exercise of free choice.

Members of this Court have, on occasion, suggested that virtually the only role of counsel in a police interview would be to instruct a defendant to assert his right to remain silent.[9] But in the context of today's criminal justice system, counseled defendants routinely choose to exercise their free will and communicate with the government. Indeed, under the federal sentencing guidelines, defendants who quickly accept responsibility for their offenses and cooperate with the government by furnishing information about others can secure dramatic sentence reductions that would be unavailable after trial. See U.S. SENTENCING GUIDELINES, MANUAL § 5K1.1 *See also* Bibas, Stephanos, *Plea Bargaining Outside the Shadow of Trial.* 117 Harv. L. Rev. 2463, 2482 (2004).[10]

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[9] *See Patterson v. Illinois*, 487 U.S. 285 (1988)("An important basis for our analysis is our understanding that an attorney's role at post-indictment questioning is rather limited, and . . . unidimensional: largely limited to advising his client as to what questions to answer and which ones to decline to answer."); *cf. Minnick v. Mississippi*, 498 U.S. 146, 162 (1990) (Scalia, J., dissenting) ("[A]t the earliest opportunity, 'any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances.'" (internal quotation omitted)).

[10] Bibas, Stephanos, *Plea Bargaining Outside the Shadow of Trial*, at 2482 ("The Federal Sentencing Guidelines have put a huge premium on another plea-bargaining technique: cooperating with the government. This venerable tactic has become much more important in recent years as one of the few ways around sentencing guidelines and mandatory minima."). See also Bibas, Stephanos *RESPONSE: The Right*

As a practical matter, well-counseled defendants often secure downward departures under the sentencing guidelines when they choose to initiate contact with the government through their counsel. In this context, a large part of counsel's job is to act as a facilitator between the defendant and the government by acquiring full and accurate information from the client and conveying it to the government by way of an "attorney proffer," which (by agreement) cannot itself be admitted in evidence against the defendant at trial.

This process enables the government to consider the value of the information that the client can provide so that the parties can reach an agreement *in advance* about the range of legal implications associated with the interview – for instance, whether the defendant's interview will lead to a favorable plea offer or the dismissal of counts in exchange; whether the interview will enable the government to move for a downward departure at sentencing on account of the defendant's "substantial assistance," *see U.S.S.G. §5K1.1*; whether the statements may be used against the defendant without limitation at trial and sentencing; or whether the defendant will be accorded some

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to Remain Silent Helps Only the Guilty, 88 Iowa L. Rev. 421, 422 (2003) ("[M]ost criminal procedure scholars mistakenly view trials as the center of the universe and assume that rational suspects should care mainly about maximizing their chances of success at trial. This academic obsession with trials bears little relationship to the real world, where only about 6% of felony defendants go to trial and most plead guilty. We live in a world of guilty pleas, not trials, and in this world suspects have many options more desirable than fighting the government's case at trial.").

measure of limited use immunity for truthful statements during the interview.

It is simply implausible to expect an uncounseled, indicted defendant to understand the full range of legal issues at play in the decision to be interviewed by the prosecution while awaiting trial. Nor is it fair to expect the defendant to navigate these treacherous waters unassisted.

While it is no doubt true that one role of counsel is to explain to a defendant the benefits and consequences of invoking one's right to remain silent, it is no longer, in the context of today's criminal justice system, counsel's most important role. Indeed, the vast majority of defendants voluntarily waive the bulk of their Sixth Amendment and due process rights by pleading guilty. And virtually all of them do so with counsel at their side, fully informed of the consequences. Given this reality, it can hardly be said that ensuring that an indicted defendant merely receive the advice of counsel would necessarily supersede the exercise of a defendant's free choice in deciding whether to communicate with the government post-attachment.[11]

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[11] Counsel, of course, is ethically obligated to inform her client of the government's request for an interview, and to abide by her client's ultimate judgment in determining whether to conduct that interview. See American Bar Association, Model Rules of Professional Conduct, Rule 1.2 ("Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer"); Rule 1.4 (requiring prompt consultation with client concerning circumstances which require the client's informed consent).

III. JACKSON FACILITATES THE ADMINISTRATION OF JUSTICE AND SAFEGUARDS THE ADVERSARIAL PROCESS.

Requiring a counseled waiver of rights after the government initiates adversarial proceedings (and the defendant either requests or is appointed counsel) promotes the administration of justice and ensures the integrity of the adversarial process.[12] This requirement is reflected in the almost universal prohibition against communications with a person represented by counsel. See American Bar Association, Rule 4.2, *Model Rules of Professional Conduct, Communication with Person Represented by Counsel* (prohibiting communication with represented party); La. Rules of Prof'l Conduct, Rule 4.2 (same); American Bar Association, Rule 5.3 (imposing responsibility on lawyer for conduct of agents or employees); La. Rules of Prof'l Conduct, Rule 5.3 (same); 28 C.F.R. 77.4(f) (2007) (prohibiting Department of Justice attorneys from directing an investigative agent to engage in conduct that would violate the attorney's own ethical obligations).

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[12] See *Estelle v. Smith*, 451 U.S. 454, 475 (1981) Rehnquist, J., *concurring* ("I concur in the judgment because . . . respondent's counsel should have been notified prior to [the state's psychiatrist's pre-trial] examination of respondent. [R]espondent had been indicted and an attorney had been appointed to represent him. Counsel was entitled to be made aware of [the doctor's] activities involving his client and to advise and prepare his client accordingly."). *See also United States v. Wade*, 388 U.S. 218, 243-237 (1967) (requiring counsel at post-indictment line-up because it is a post-attachment encounter between the accused and the government, and therefore a critical stage of the prosecution).

The presence of counsel at post-attachment questioning facilitates the efficient administration of justice – often to the benefit of both the defendant and the prosecution. For instance, un-counseled defendants may not be aware in the first instance of the value of information they possess, and the beneficial effects that cooperation with the government may have on their case. *See* Bibas, 117 Harv. L. Rev. at 2485 ("A defendant's lawyer can make a big difference in the cooperation process. Experienced criminal defense attorneys understand the potential benefits of fast cooperation and may tell their clients this fact.")[13]

Similarly, defense counsel can make certain that admissions are complete, fully explained, and, where necessary, provided in context. For instance, in *Montejo*, defense counsel present at the post-attachment encounter could have explained that an accurate identification of a co-defendant would have significant beneficial impact, but that the provision of false information would be detrimental.

In addition, the presence of counsel at post-attachment questioning often minimizes confusion about what the defendant has actually said and thereby enhances factual accuracy. Ensuring that a defendant responds carefully and completely to the questions asked, and that there is no miscommunication between questioner and questionee, is a crucially important function in the absence of jury and judicial fact-finding.

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[13] *Id.* at 2484 ("Knowledge of possible downward departures and adjustments can make a difference of years to a defendant's sentence.").

Un-counseled defendants may also be unaware of the significance of facts that can diminish their culpability or – as in the *Montejo* case – undermine mitigating circumstances or constitute aggravating evidence. See *Estelle v. Smith*, 451 U.S. 454, 471 (1981) (finding a Sixth Amendment violation where defendant was interviewed by state psychiatrist without counsel noting the complexity of the issue rendered it "'literally a life or death matter' . . . 'difficult . . . even for an attorney' . . . It follows logically from our precedents that a defendant should not be forced to resolve such an important issue without "the guiding hand of counsel.")[14]

Further, as noted above, participation by defense counsel in any post-indictment encounters with the government may allow a defendant to obtain a downward departure or other sentencing relief for cooperating with the government.[15]

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[14] *See Escobedo v. Illinois*, 378 U.S. 478, 486 (1964) ("Petitioner, a layman, was undoubtedly unaware that under Illinois law an admission of "mere" complicity in the murder plot was legally as damaging as an admission of firing of the fatal shots."); *Spano v. New York*, 360 U.S. 315, 325-326 (1959) (Douglas, J., concurring) ("Depriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. . . . As Professor Chafee once said, 'A person accused of crime needs a lawyer right after his arrest probably more than at any other time. . . . When he is deprived of that right after indictment and before trial, he may indeed be denied effective representation by counsel at the only stage when legal aid and advice would help him.'")

[15] *See* Margareth Etienne, An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines, 92 Calif. L. Rev. 425, 483 (2004) (noting

The provision of counsel at post-attachment encounters between the government and an accused thus advances the administration of justice and the integrity of the adversarial process. *Jackson*'s bright-line rule also eliminates swearing contests over whether a waiver of rights was knowing and voluntary.[16]

And regardless of any purported waiver of the right to counsel, courts have a separate and independent interest in ensuring the integrity of the adversarial process. *See Indiana v. Edwards*, 554 U.S. ____ (2008) ("Further, proceedings must not only be fair, they must 'appear fair to all who observe them.'"); *Wheat v. United States*, 486 U.S. 153, 158 (1988) ("In *United States v. Morrison*, 449 U. S. 361 (1981), we observed that this right was designed to assure fairness in the adversary criminal process. Realizing that an unaided layman may have little skill in arguing the law or in coping with an intricate procedural system, *Powell v. Alabama*, 287 U. S. 45 (1932); *United States v. Ash*, 413 U. S. 300 (1973), we have held that the Sixth Amendment secures the right to the assistance of counsel, by appointment if necessary, in a trial for any serious

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availability of downward departure may depend on how early defense counsel encourages the defendant to co-operate with the government and that "Defense lawyers act as the buffer between the defendant and the rest of the system. They try to help their clients through the complex maze of a criminal case, the facts, and the consequences of all the possible options they might have.").

[16] See *Montejo v. Louisiana*, 07-1529, Transcript of Oral Argument at 36-37. ("Justice Stevens: Louisiana [] does not provide a transcript of all these hearings, does it? Ms. Landry: No, Your Honor.").

crime. . . . and that, in evaluating Sixth Amendment claims, 'the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.'") (internal citations omitted).[17]

Once a defendant actually has counsel, allowing the government to circumvent that relationship to secure an adversarial advantage distorts the integrity of the process. *United States v. Gouveia*, 467 U.S. 180, 189 (1984) (observing that once "the government has committed itself to prosecute," and when "the adverse positions of government and defendant have solidified," "[i]t is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.")[18]

Jackson recognizes the importance of counsel as a medium between the accused and the government at critical pretrial stages, respects the autonomy of the accused, provides a bright-line rule for law enforcement, and has proved relatively easy for courts to apply. The Criminal Justice Institute urges the Court to leave the well-considered *Jackson* rule intact.

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[17] From the onset of adversarial proceedings, *Jackson* eliminates concern of "government overreaching" by ensuring that the government has no incentive to circumvent the adversarial process. Cf. *Corley v. United States*, 556 U.S. __ (2009) (noting that prompt presentment rule permitting the "defendant a chance to consult with counsel" is one of "several key steps to foreclose government overreaching.").

[18] Cf. *Strickland v. Washington*, 466 U.S. 668, 686 (U.S. 1984) ("[G]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.") citing *Geders v. United States*, 425 U.S. 80 (1976) (finding unconstitutional a bar on attorney-client consultation during overnight recess).

CONCLUSION

For the aforementioned reasons, *amicus* the Criminal Justice Institute urges this Court to reaffirm *Michigan v. Jackson*.

Respectfully submitted,

MILES EHRLICH
Ramsey & Ehrlich LLP
803 Hearst Avenue
Berkeley, CA 94710

STEPHEN SINGER,
Loyola Law School
7214 St. Charles Avenue
New Orleans, LA 70118

Ronald S. Sullivan, * Director,
Harvard Criminal Justice Institute
301 Austin Hall, 1515 Massachusetts Avenue
Cambridge, MA 02138
Telephone: 617-496-8143

**Counsel of Record for Amicus Curiae*

April 14, 2009

AMICUS
CURIAE
BRIEF

125 (16)

Supreme Court, U.S.
FILED
APR 14 2009
OFFICE OF THE CLERK

No. 07-1529

IN THE
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ON WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

SUPPLEMENTAL BRIEF OF AMICI CURIAE LARRY D. THOMPSON, WILLIAM SESSIONS, et al., IN SUPPORT OF PETITIONER

Robert N. Weiner
(*Counsel of Record*)
Andrew T. Karron
John A. Freedman
Sarah E. Warlick
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000
Attorneys for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of numerous former federal and state law enforcement officers, prosecutors, and judges who believe that *Michigan v. Jackson*, 475 U.S. 625 (1986), provides bright-line guidance for post-arraignment custodial interrogations, that the decision promotes fair, effective law enforcement, and that overturning it would sow confusion and undermine our criminal justice system.[1]

SUMMARY OF ARGUMENT

Twenty-three years ago, this Court in *Jackson* held that if police initiate interrogation after attachment of the right to counsel, where the defendant has a lawyer or has requested a lawyer, waiver of the right to counsel for that interrogation is invalid. Since then, this rule -- like the rule in *Miranda v. Arizona*, 384 U.S. 436 (1966) -- "has become embedded in routine police practice." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Under the most basic precepts of *stare decisis*, overruling *Jackson*, and departing radically from well-settled precedent, requires "special justification." *Id.* (citations omitted). As the Court has observed, a constitutional decision, particularly one that enforces fundamental liberties, should stand unless it has proven "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration" for "articulable reasons." *See Vasquez v. Hillery*, 474 U.S. 254, 266 (1986).

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[1] The Appendix includes a list of the *amici* filing this brief. Counsel for a party did not author this brief in whole or in part, and no person or entity, other than the *amici curiae* or counsel, have made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37 of the Rules of the Supreme Court, the parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk of the Court.

The *amici* advocating that *Jackson* be overturned did not mention *stare decisis* in their brief.[2] When measured against the high threshold for discarding well-established precedent, their arguments are unpersuasive. There is no justification for discarding this longstanding precedent.

As experienced law enforcement officials, former prosecutors, and judges who have, respectively, apprehended and interrogated, prosecuted, and tried criminal defendants, and who have addressed issues of law enforcement policy, *amici* have special insights on the rule of *Jackson*. In particular, *amici* have had the opportunity to assess whether the rule has proved unworkable or, to the contrary, has become routine ingrained practice for law enforcement officers, and whether it has undermined law enforcement and the criminal justice system or, to the contrary, has avoided confusion, controversy, and unfairness. Our experience convinces us that *Jackson* should not be overruled and that the negative consequences of doing so would far outweigh any benefits.

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[2] *See* Brief for The State of New Mexico et al. as Amici Curiae Supporting Respondent, *Montejo v. Louisiana* (No. 07-1529).

First, the *amici* who are former law enforcement officers and prosecutors believe that, far from being impractical or destructive, *Jackson* provides an easily enforceable rule governing post-arraignment custodial interrogations. The simplicity and clarity of the rule facilitate the training of police officers. It enables prosecutors easily to assess the legality of confessions. And it provides judges a straightforward, objective standard to determine whether those confessions are admissible. If a defendant is appointed counsel or requested a lawyer, the police may not initiate questioning without counsel present. If a defendant who neither is represented nor has requested counsel makes a statement after being advised of and waiving *Miranda* rights, the statement will likely be admissible.

Absent such a clear test, law enforcement personnel, prosecutors, and trial judges will have to start anew in developing a common law from particularized decisions reflecting inherently subjective assessments of the tactics as well as the intent of investigators, the timing as well as the content of interrogations, and the understanding as well as the free will of defendants.

Second, the *amici* who are former law enforcement officers or prosecutors believe the rule of *Jackson* "has become embedded in routine police practice." *Dickerson*, 530 U.S. at 430. Hundreds of thousands of law enforcement personnel have been trained to comply, and do comply, with it. The decision has not slowed the dramatic improvements in law enforcement practices.

Third, *Jackson* links two key criminal procedural rights -- the Sixth Amendment right to counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963), and the Fifth Amendment rights of an accused under *Miranda* -- which are fundamental to the adversary process and maintain public confidence in our criminal justice system. Discarding *Jackson* would undermine both rights. Allowing the police to initiate interrogation of a represented defendant and to use any resulting statements would strip away protections the attorney can provide, interfere with the relationship between counsel and client, and undercut the integrity of criminal trials. It would also contradict the commitment made to defendants through *Miranda* warnings. These Fifth and Sixth Amendment rights, and the procedures for securing them, "have become part of our national culture." *Dickerson*, 530 U.S. at 443. To abandon a rule that safeguards them would erode the public confidence they foster. It would signal that enduring legal principles and important constitutional rights are no longer so enduring nor so important.

ARGUMENT

I. THE LONG-ESTABLISHED RULE OF *JACKSON* PROMOTES EFFECTIVE LAW ENFORCEMENT.

As this Court has repeatedly affirmed, *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez*, 474 U.S. at 265-66. Overruling well-established precedent is justifiable only if it has proved "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration." *Id.* at 266. *See also Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."); *California v. Acevedo*, 500 U.S. 565, 579 (1991) ("[T]his Court has overruled a prior case on the comparatively rare occasion when it has bred confusion or has been a derelict or led to anomalous results.").

Jackson is neither "ill-founded" nor "unworkable." For more than two decades, it has provided a clear, easily followed rule governing interrogations of an accused once the right to counsel has attached. Not only does *Jackson* safeguard the

Sixth Amendment right to counsel, it also facilitates the allocation of prosecutorial resources and informs the exercise of prosecutorial discretion by providing prosecutors a comprehensible standard for assessing the admissibility of an interrogation and for determining the strength of their case. Further, it avoids the burden on judicial, prosecutorial, and law enforcement resources that would result from intensely fact-bound, case-by-case adjudications, in suppression hearings and collateral proceedings, of the voluntariness and constitutionality of confessions.

Undoubtedly, *Jackson* reduces opportunities to interrogate defendants. And it may require exclusion of evidence that could support a criminal conviction. Based on our experience, however, we believe that it is a rare case where this rule lets a guilty defendant go free. In our view, *Jackson* has done far more to promote effective law enforcement than to undermine it.

Jackson did not establish, and overruling it will not eliminate, the obligation of law enforcement personnel to respect defendants' constitutional rights. But abandoning *Jackson's* bright-line standard will make fulfillment of that obligation by law enforcement officials more uncertain, and enforcement of it by judges more cumbersome and unpredictable. In our experience, a clear rule defining in advance the appropriate circumstances for interrogation is inherently more workable, and ultimately more just, than relying on *post-hoc* judicial evaluation of the voluntariness of a confession and the propriety of the conduct of law enforcement personnel.

A. *Jackson* Provides Clear Guidance For Law Enforcement Officers.

The *amici* who are former law enforcement officers or prosecutors recognize the significant role confessions play in investigating and prosecuting crimes. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) ("[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him . . ."). But *amici* also recognize the importance of ensuring that confessions are obtained in a manner consistent with defendants' constitutional rights.

For 23 years, *Jackson* has provided clear guidance to law enforcement officials, prosecutors, and courts.[3] The rule does not preclude the admissibility of all confessions after the right to counsel attaches; for example, where the defendant initiates contact with law enforcement personnel, the Sixth Amendment would not bar admission of the statement. *Jackson*, 475 U.S. at 636. Similarly, the presence of defense counsel ensures that any incriminating statement by a defendant is "truly . . .

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[3] Decisions following *Jackson* confirm that its clear, bright-line rule has proven easy to apply. *See, e.g., Wilson v. Murray*, 806 F.2d 1232 (4th Cir. 1986); *Murphy v. Holland*, 845 F.2d 83 (4th Cir. 1988); *West Virginia v. Crouch*, 358 S.E.2d 782, 783 (W. Va. 1987) ("The law on this issue is set out clearly in *Michigan v. Jackson* . . .").

the product of . . . free choice." *Miranda,* 384 U.S. at 458. But in precluding the use of post-attachment responses to questioning initiated by law enforcement personnel, *Jackson* safeguards the defendant's Sixth Amendment right to assistance of counsel at all critical stages of the proceedings, including interrogation. It also prevents erosion of the right to counsel by preventing impairment of the attorney-client relationship or intrusions into counsel's advice and tactical decisions. That, in turn, safeguards defendants' other rights, including their Fifth Amendment rights against self-incrimination and coercive interrogation. In all these ways, *Jackson* protects the integrity of criminal trials and thereby enhances the credibility and effectiveness of law enforcement and the criminal justice system.

1. Bright-line Rules Facilitate Efficient Law Enforcement.

This Court, as well as other federal and state courts, has long recognized the value of bright-line rules like the rule in *Jackson.* In particular, this Court has articulated a series of clear tests to guide custodial interrogations: whether the suspect is in custody, *Oregon v. Mathiason,* 429 U.S. 492 (1977); whether the suspect has been advised of his or her rights, *Miranda,* 384 U.S. 436; whether the suspect has requested counsel, *Edwards v. Arizona,* 451 U.S. 477 (1981), or otherwise has not waived *Miranda* rights, *see generally Miranda,* 384 U.S. 436; and whether the police have conducted "interrogation," *Rhode Island v. Innis,* 446 U.S. 291 (1980). These straightforward rules protect the constitutional rights of defendants, ensure appropriate law enforcement practices, and avoid wasting law enforcement resources in collateral constitutional challenges. *See, e.g., Dunaway v. New York*, 442 U.S. 200, 213-14 (1979) (bright-line rules "guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront"); *Michigan v. Tucker*, 417 U.S. 433, 443 (1974) (bright-line rules "help police officers conduct interrogations without facing a continued risk that valuable evidence would be lost").

Jackson fits squarely within this approach. Police officers know that if they initiate interrogation of a defendant who has been assigned or requested counsel, any purported waiver of Sixth Amendment rights will be invalid, and the evidence will be inadmissible.

The clear standard of *Jackson* has additional benefits. For example, it allows law enforcement officers to focus on investigating and preventing crimes, without having to calculate the evidentiary consequences of their conduct in unpredictable and fast-paced situations. *See, e.g., Oregon v. Elstad*, 470 U.S. 298, 316 (1985) ("Police officers are ill-equipped to pinch-hit for counsel, construing the murky and difficult questions . . ."). The rule in *Jackson* also reduces the need for judicial re-examination of the complex decisions law enforcement agents must make in investigating a case and interrogating suspects.

Overruling *Jackson* would eliminate clear guidance to law enforcement officers as lower courts consider case-by-case the voluntariness of a confession obtained after a defendant has been assigned or requested counsel, or the propriety of the interrogation on other Sixth Amendment grounds. Proponents of overturning the rule in *Jackson* have not specified any replacement; necessarily, though, any substitute would be more subjective, ranging toward an open-ended, totality-of-the-circumstances inquiry. Case law before *Jackson* reflects that the determinations could encompass many different factors, including:

- whether the interrogation occurred before arraignment or after, *see, e.g., United States v. Mohabir*, 624 F.2d 1140, 1145 (2d Cir. 1980);

- whether law enforcement personnel knew that the suspect was represented by counsel, *see, e.g., State v. Norgaard*, 653 P.2d 483, 487 (Mont. 1982);

- whether law enforcement personnel deliberately sought to keep the lawyer and the client apart, *see, e.g., Massiah v. United States*, 377 U.S. 201, 206 (1964);

- whether the interrogation -- purposefully or not -- extracted privileged information or trial strategy, and whether the interrogation otherwise thwarted or tainted the attorney-client relationship, *see, e.g.*, *Massiah*, 377 U.S. at 209 (White, J., dissenting); and

- whether the interrogation undermined the fairness of the trial and compromised the adversarial system, *see, e.g., Estelle v. Smith*, 451 U.S. 454, 470-71 (1981).

Moreover, as is evident in the pre-*Jackson* cases, the uncertainty resulting from abandoning the bright-line rule of *Jackson* would yield disparities not only in conduct by police, but also in standards adopted by courts,[4] and in applications of those standards within and between jurisdictions.

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[4] *Compare Mohabir*, 624 F.2d at 1153 (waiver valid only if "preceded by a federal judicial officer's explanation of the content and significance of this right") *with United States v. Shaw*, 701 F.2d 367, 380 (5th Cir. 1983) (waiver valid only if right was "knowingly and intelligently relinquished") *with People v. Superior Court of Fresno County*, 145 Cal. App. 3d 581, 593 (Cal. Ct. App. 1983) ("police-initiated interrogation is barred" unless counsel has been notified) *with Norgaard*, 653 P.2d at 487 (waiver valid if "written or oral [*Miranda*] warnings have been given").

The ambiguity inherent in such an approach would impose significant costs. Law enforcement personnel would have to make on-the-spot judgments about essentially legal issues; prosecutors would have to review and defend such judgments; and courts would have to delve into the defendant's and officer's mental states. The ensuing litigation would consume scarce law enforcement resources by increasing the demands on officers for testimony, as well as on prosecutorial and judicial resources to adjudicate challenges. Uncertainty, unpredictability, burden, and expense are not only problematic in themselves. They also increase the risk of constitutional violations that would render any evidence obtained (or its fruits) inadmissible, potentially imperiling otherwise prosecutable cases.

2. Law Enforcement Authorities Have Implemented Procedures Complying With *Jackson*

After *Jackson*, participants in the criminal justice system understood that once a defendant had been appointed or requested counsel, police could not initiate an interrogation without counsel present. In the experience of the law enforcement *amici*, far from finding *Jackson* "unworkable," the law enforcement community has had no difficulty in implementing it. Generations of police officers have been trained to the rule of *Jackson*. For example, the Federal Bureau of Investigation Legal Handbook for Special Agents explains:

(7) Request for Legal Representation at a Court Proceeding - If an accused, during the course of an initial appearance or other court proceeding, requests to be represented by legal counsel or accepts the court appointment of counsel, no interview of the accused may take place concerning the charge(s) for which the accused has appeared in court unless:

(a) the accused's counsel is present; or

(b) the accused initiates the contact with the Agents and is expressly advised that he/she has the right to be represented by separate counsel; or

(c) contact is necessary to acquire information critical to life and the presence of counsel will delay or impede the receipt of the needed information; or

(d) the contact has been approved by the United States Attorney's Office or other Department of Justice official based on extenuating circumstances such as defense counsel's involvement in the criminal offense or other serious conflict of interest.

FBI L*EGAL* H*ANDBOOK FOR* S*PECIAL* A*GENTS*, § 7-4.1(7), Eff. Date 7/26/99 (2003). *See also* Kenneth A. Myers, *Avoiding Sixth Amendment Suppression: An Overview and Update,* FBI LAW ENFORCEMENT BULLETIN 23 (Mar. 1, 2009), *available at 2001 WLNR 4701493* (post-attachment confession admissible only if "defendant initiated the contact (and was properly warned of and waived these rights) or the defendant's attorney was present for the interrogation").[5]

There is no evidence that law enforcement has suffered under this rule. Police periodicals discussing the decision rarely, if ever, complain that it impedes investigations or prosecutions.[6] But eliminating the bright-line rule could have that effect. At the very least, it would complicate efforts to train law enforcement officers on how to conduct interrogations for at least two reasons.

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[5] *See also* John C. Klotter, *Legal Guide for Police: Constitutional Issues* 201 (6th ed. 2002) ("[O]nce a criminal defendant invokes his or her Sixth Amendment right to counsel, a subsequent waiver of that right, even if voluntary, knowing, and intelligent under traditional standards, is presumed invalid if secured pursuant to a police-initiated conversation."); UNITED STATES DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT AGENCY MANUAL § 6641.31(J) (2002) ("Once an attorney has been obtained or appointed for the defendant, any subsequent contact with the defendant must be made through or with the concurrence of his attorney."); Kimberly A. Crawford, *The Sixth Amendment Right to Counsel: Application and Limitations*, FBI LAW ENFORCEMENT BULLETIN 27 (July 31, 2001), *available at* 2001 WLNR 4701493 (explaining this Court's holding in *Michigan v. Jackson* and how it impacts law enforcement).

[6] *See, e.g.,* Ralph B. Means, *Interrogation Law . . . Reloaded: The Two Rights to Counsel*, THE POLICE CHIEF, Dec. 2003, available at http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=171&issue_id=122003; Devallis Rutledge, *Pinpointing the Right to Counsel:*

First, custodial interrogations are, by and large, governed by bright-line tests. Overturning *Jackson* would introduce a subjective test to assess whether a defendant's response without counsel to questioning initiated by an officer constitutes a knowing and intelligent waiver of constitutional rights. Displacing an objective inquiry with such a subjective, case-specific appraisal would force trainers to teach judgment, significantly increasing the complexity and indeterminacy of interrogation training.

Second, eliminating the bright-line rule would result in potentially conflicting directives to law enforcement officers, given the requirement of *Edwards v. Arizona* that "once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him." *Solem v. Stumes*, 465 U.S. 638, 638 (1984) (citing *Edwards*, 451 U.S. at 484-85). Training law enforcement officers to follow

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When Does a Suspect's Sixth Amendment Right Arise?, POLICE: THE LAW ENFORCEMENT MAGAZINE, Aug. 2008, available at http://www.policemag.com/Articles/ 2008/08/Pinpointing-the-Right-to-Counsel.aspx. *See generally* Laurie Magid, *Questioning the Question-Proof Inmate: Defining Miranda Custody for Incarcerated Suspects*, 58 OHIO ST. L.J. 883, 898 (1997) ("Because the Sixth Amendment right to counsel applies only to charged crimes, it does not create a great obstacle for officials investigating crimes.").

one standard for custodial interrogation when the suspect invokes the right to counsel and a separate, subjective standard when counsel is appointed at arraignment will sow confusion and error.[7]

B. The Clear Guidance Of *Jackson* Aids Prosecutors In Fulfilling Their Duties.

The former prosecutor *amici* believe that the bright-line rule of *Jackson* aids prosecutors in performing their role in the criminal justice system in at least three ways.

First, it facilitates efficient evaluation of cases and informs the exercise of prosecutorial discretion. Applying unambiguous constitutional standards, prosecutors can better determine whether confessions or other evidence are vulnerable to suppression. The inquiry need focus on relatively few and essentially objective facts -- whether the defendant had been assigned or requested counsel at the time of the confession, whether counsel was present, and if not, whether the defendant initiated the contact with law enforcement.

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[7] Overruling *Jackson* would potentially create uncertainty concerning the attachment of the right to counsel. This Court has recognized that the Sixth Amendment provides protections beyond those of the Fifth Amendment. *See, e.g, Fellers v. United States*, 540 U.S. 519, 524 (2004) (post-indictment statements during noncustodial interrogation violated Sixth Amendment even though they would have satisfied Fifth Amendment). Any ruling that blurs the line demarcating the attachment of the Sixth Amendment right risks confusion and violations of the right.

Abandoning *Jackson* would hamper this sort of evaluation. Prosecutors would need to consider numerous subjective factors relevant to the effectiveness of a waiver and the integrity of the impending trial. Moreover, given the number and elusiveness of these factors, and the difficulty of ascertaining all the relevant facts early in the proceedings (usually without access to the defendant's version of the facts surrounding the statement), prosecutors may lack confidence regarding the admissibility of the evidence, which in turn could affect the charging decision.

Second, as noted, the clarity of the *Jackson* rule helps conserve prosecutorial resources by reducing judicial proceedings. A defendant who knows that the police complied with *Jackson* is less likely to waste time disputing the issue.

Third, the ability of both the prosecutor and defense counsel to use a simple, objective standard to evaluate the admissibility of statements facilitates plea bargaining. Overruling *Jackson* would introduce additional uncertainty, leading to disparate evaluations of the outcome of a suppression hearing.

II. SETTLED COMMUNITY EXPECTATIONS WEIGH HEAVILY AGAINST OVERRULING *JACKSON*

Discarding *Jackson* would confound settled expectations regarding the criminal justice system. It would nullify decades of practice and require development and implementation of entirely new procedures. Such changes in settled rules are not only disruptive for law enforcement officials. They are also inimical to public confidence in the courts and law enforcement, particularly when, as here, the change appears to undermine the right to counsel that every schoolchild appreciates from the *Miranda* warnings. Ultimately, the legitimacy of the criminal justice system, the effectiveness of juries, and the public's support for law enforcement depend upon confidence in the justice system's fairness, consistency, predictability, and stewardship of our most basic rights. The Court should not put that confidence at risk.

This Court has cautioned that public confidence in the legal system depends upon consistent application of law, including the Court's consistent application of its own prior decisions. *See Payne*, 501 U.S. at 827; *Vasquez*, 474 U.S. at 265-66. *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996) (citation omitted). *Stare decisis* "thereby avoids the instability and unfairness that accompany disruption of settled legal expectations." *Randall v. Sorrell*, 548 U.S. 230, 244 (2006).

Because *Jackson* lies at the intersection of two important criminal procedural rights -- the right to counsel under *Gideon* and the *Miranda* rights of an accused -- overruling *Jackson* would erode the Court's legitimacy, disrupt established legal expectations, and thus undercut "the legal stability . . . upon which the rule of law depends." *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (2008).

Both *Gideon* and *Miranda* protect the vitality of our adversary process while also promoting public support for our criminal justice system. Repudiating *Jackson* would undermine the Fifth and Sixth Amendment rights those cases have enshrined in the public consciousness. Allowing the police to initiate conversations with certain represented defendants to obtain evidence against them could spur practices that undermine the defendant's relationship with defense counsel or otherwise render hollow the commitment made to defendants through *Miranda* warnings. The right to counsel and *Miranda* "have become part of our national culture." *Dickerson*, 530 U.S. at 443. Renouncing a decision that established a rule to preserve and protect those rights would damage public confidence in the criminal justice system.

Disapproving *Jackson* would potentially cast doubt on the fairness of our legal system. Ultimately, such doubts could also hurt law enforcement efforts by undermining the relationship between law enforcement officers and the communities they protect. Officers across the country depend on citizens to aid in investigations, testify as witnesses, and serve as jurors. Much of this cooperation is rooted in the respect of individual citizens for the legal system and law enforcement and public faith that officers are not arbitrary or coercive. Abandoning this Court's precedents -- particularly in a way that could be perceived as a step back from *Gideon* and *Miranda* -- could reduce the cooperation law enforcement officers receive from the public.

CONCLUSION

For these reasons, *amici* respectfully request that the Court reverse the judgment of the Supreme Court of Louisiana.

Respectfully submitted,

Robert N. Weiner
(*Counsel of Record*)
Andrew T. Karron
John A. Freedman
Sarah E. Warlick
Amy L. Likoff*
Dan Leary*
Andrew D. Becher*
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Attorneys for *Amici Curiae*

April 14, 2009

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* Not admitted in the District of Columbia. Practicing pending approval of application for admission to the D.C. Bar and under supervision of attorneys of the firm who are members in good standing of the D.C. Bar.

APPENDIX

AMICI CURIAE

James S. Brady,
United States Attorney, Western District of Michigan, 1977-81

William G. Broaddus,
Attorney General, Commonwealth of Virginia, 1985-86

Edward N. Cahn,
Judge, United States District Court, Eastern District of Pennsylvania, 1974-98, Chief Judge, 1993-98

Joseph Curran, Jr.,
Attorney General, Maryland, 1987-2007

Robert J. Del Tufo,
Attorney General, State of New Jersey, 1990-93; United States Attorney, District of New Jersey, 1977-80; First Assistant State Attorney General and Director of New Jersey's Division of Criminal Justice

Bennett Gershman,
Former Prosecutor, Manhattan District Attorney's Office, 1966-1976

John Gibbons,
Chief Judge of the United States Court of Appeals, Third Circuit, 1970-1990

Stewart F. Hancock, Jr.,
Associate Judge, New York Court of Appeals, 1986-94; Justice, New York State Supreme Court, 1971-86

Roscoe C. Howard,
United States Attorney, District of Columbia, 2001-04

Thomas D. Lambros,
Judge, United States District Court, Northern District of Ohio, 1967-95, Chief Judge 1990-95

William A. Norris,
Judge, United States Court of Appeals for the Ninth Circuit, 1980-97; former president of the Los Angeles Police Commission

Stephen M. Orlofsky,
Judge, United States District Court for the District of New Jersey, 1996-2003; United States Magistrate Judge, District of New Jersey, 1976-80

Richard A. Rossman,
Chief of Staff, Criminal Division, United States Department of Justice, 1998-99; United States Attorney, Eastern District of Michigan, 1980-81; Chief Assistant United States Attorney, Eastern District of Michigan 1977-80

Stephen H. Sachs,
Attorney General, State of Maryland, 1979-87; United States Attorney, District of Maryland, 1967-70

William Sessions,
Director, Federal Bureau of Investigation, 1987-93; Judge, United States District Court for the Western District of Texas, 1974-87, Chief Judge, 1980-87; United States Attorney, Western District of Texas, 1971-74

Larry D. Thompson,
Deputy Attorney General of the United States, 2001-03; former United States Attorney, Northern District of Georgia

Paul R. Thomson, Jr.,
United States Attorney, Western District of Virginia, 1975-79

James J. West,
United States Attorney, Middle District of Pennsylvania, 1985-93

Alfred Wolin,

Judge, United States District Court for the District of New Jersey, 1987-2004, Senior Judge 2000-04; Presiding Judge, Superior Court of New Jersey, Criminal Division, 1983-87; Judge, Superior Court of New Jersey, Civil Division, 1982-83; Judge, Superior Court of New Jersey, Juvenile and Domestic Relations Division, 1980-82; Judge, Union County District Court, 1980-85

AMICUS
CURIAE
BRIEF

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No. 07-1529

Supreme Court, U.S.
FILED
APR 14 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JESSIE JAY MONTEJO,
Petitioner,

V.

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari
to the Supreme Court of Louisiana

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA, THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, AND THE SOUTHERN CENTER FOR HUMAN RIGHTS AS AMICI CURIAE ON THE SUPPLEMENTAL QUESTION

BARBARA BERGMAN
Co-chair, Amicus Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1117 Stanford, N.E.
Albuquerque, N.M. 87131
(505) 277-3304

JONATHAN L. MARCUS
Counsel of Record
ANNA E. LUMELSKY
GARY FELDON
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

(additional counsel listed on inside cover)

[illegible] 4[illegible]98

97893 A 30

STEVEN SHAPIRO
ROBIN DAHLBERG
AMERICAN CIVIL LIBERTIES
UNION NATIONAL LEGAL
OFFICE
125 Broad Street
18th Floor
New York, NY 10004
(212) 549-2500

KATIE SCHWARTZMANN
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
LOUISIANA
PO Box 56157
New Orleans, LA 70156
(504) 592-8056

STEPHEN B. BRIGHT
WILLIAM R. MONTROSS, JR.
SOUTHERN CENTER FOR
HUMAN RIGHTS
83 Poplar Street, NW
Atlanta, GA 30303
(404) 688-1202

DAVID S. UDELL
MELANCA CLARK
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6730

SIDNEY S. ROSDEITCHER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

APRIL 2009

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

The American Civil Liberties Union ("ACLU") is a nonprofit, nonpartisan national organization, and the ACLU of Louisiana is one of its state affiliates. The ACLU is dedicated to preserving the principles of liberty and equality embodied in the Constitution and the civil rights laws of this country.

The Brennan Center for Justice at New York University School of Law ("Brennan Center") is a nonpartisan public policy and law institute that focuses on fundamental issues of democracy and justice.

The Southern Center for Human Rights is a nonprofit organization engaged in litigation, public education, and advocacy to protect the civil and human rights of criminal defendants and prisoners in the South.

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[1] Each party has consented to the filing of this brief. Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

The NACDL, the ACLU, the ACLU of Louisiana, and the Brennan Center submitted a prior amicus brief in this case on November 24, 2008.

SUMMARY OF ARGUMENT

This Court has long recognized that the Constitution provides a distinct set of protections to an individual against whom a criminal prosecution has been formally initiated. In particular, the Court has stressed the importance of the Sixth Amendment right to the assistance of counsel, and the crucial role that counsel plays as a "'medium' between [the defendant] and the State." *Maine v. Moulton*, 474 U.S. 159, 176 (1985). To ensure that a defendant who desires the assistance of counsel at all critical stages of the prosecution in fact receives it, this Court held in *Michigan v. Jackson*, 475 U.S. 625 (1986), that, outside the presence of counsel, the police may not initiate interrogation of a defendant who has indicated a desire for counsel at an arraignment or similar proceeding. This Court later made clear that the *Jackson* rule is rooted in the constitutional protection against police-initiated interrogation outside the presence of counsel that attends defendants already represented by counsel, who presumptively desire counsel's assistance at all critical stages of the prosecution. *See Michigan v. Harvey*, 494 U.S. 344, 352 (1990); *Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988).

The *Jackson* rule ensures that the right to assistance of counsel does not become a meaningless abstraction, easily lost when police confront the defendant outside the presence of counsel. Amici strongly support the *Jackson* rule for all persons. In this brief, however, amici present empirical evidence that the concerns undergirding the *Jackson* rule are magnified for particularly vulnerable defendants, including the mentally and developmentally disabled, juveniles, those lacking education, those with substance addiction, and the indigent. These defendants are especially vulnerable to police suggestion that counsel is unnecessary, many such defendants lack the capacity to appreciate the importance of counsel, and many exhibit characteristics that make them prone to give false confessions. If *Jackson* were overruled, incidents of false confessions would likely increase. And, while serious harm would be done to our criminal justice system as a whole, the most severe and tragic consequences would befall the most vulnerable defendants.

ARGUMENT

I. *Michigan v. Jackson* Is Essential To Protect The Sixth Amendment Right Of Defendants, Especially The Most Vulnerable, To The Assistance Of Counsel Once Formal Adversary Proceedings Have Commenced.

Once "the Government has committed itself to prosecute," *Kirby v. Illinois*, 406 U.S. 682, 689 (1972), the Sixth Amendment guarantees a defendant more than simple notice of the right to counsel—it guarantees the right to "*Assistance* of Counsel." U.S. Const. amend. VI (emphasis added). The relationship between a represented defendant and counsel thus commands heightened protection from government interference once formal adversary proceedings have commenced. *See Patterson*, 487 U.S. at 290 n.3; *Harvey*, 494 U.S. at 352. In *Jackson*, this Court recognized that the Sixth Amendment right of a defendant who indicates a desire for an attorney but has not yet had one appointed must be similarly protected, and held that the police may not initiate interrogation of such a defendant without counsel present. *Jackson*, 475 U.S. at 636; *Patterson*, 487 U.S. at 290 n. 3.[2]

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[2] In *Patterson*, this Court explicitly noted this link between *Jackson* and the attorney-client relationship:

> Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect. ... Indeed,

(...continued)

The *Jackson* rule thus lies at the core of this Court's Sixth Amendment jurisprudence, which prohibits State attempts to "circumvent the right to the assistance of counsel" through "exploitation . . . of an opportunity to confront the accused without counsel being present." *Moulton*, 474 U.S. at 176; *see also United States v. Henry*, 447 U.S. 264, 274 (1980); *Massiah v. United States*, 377 U.S. 201, 206 (1964). The *Jackson* rule does nothing to prevent defendants from choosing on their own initiative to speak to the police without counsel present, *see Harvey*, 494 U.S. at 352, but instead protects counsel's role "as a 'medium' between [the defendant] and the State," *Moulton*, 474 U.S. at 176.[3]

> the analysis changes markedly once an accused even *requests* the assistance of counsel. *See Michigan v. Jackson*.

Patterson, 487 U.S. at 290 n.3 (additional citations omitted). *See also Harvey*, 494 U.S. at 352.

[3] The rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), which protects the right against self-incrimination by prohibiting further uncounseled interrogation of suspects who have asserted their *Miranda* rights, *id.* at 484, does not protect the Sixth Amendment role of counsel. *See McNeil v. Wisconsin*, 501 U.S. 171, 177–78 (1991) (distinguishing the Sixth Amendment purpose of "'protect[ing] the unaided layman at critical confrontations' with his 'expert adversary'" from the "quite different interest" protected by *Miranda* and *Edwards*); *cf. Moran v. Burbine*, 475 U.S. 412, 425 (1986) (noting that, although the police failure to inform defendant during an interrogation that counsel was trying to reach him did not violate the Fifth Amendment, the same conduct would violate the Sixth Amendment). Moreover, the Sixth Amendment protection of *Jackson* applies outside the context of custodial interrogation, once adversary proceedings have commenced, while the Fifth Amendment protection of *Edwards* does not. (...continued)

This Court has long recognized that, as important as counsel's role of "medium" is for sophisticated and educated defendants, that role is particularly critical for defendants who do not possess such advantages:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. ... He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Powell v. Alabama, 287 U.S. 45, 68-69 (1932). *See also Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002) ("Mentally retarded defendants may be less able to give meaningful assistance to their counsel and ... in the aggregate face a special risk of wrongful execution."); *Carnley v. Cochran*, 369 U.S. 506, 511 (1962) (noting that the fact that petitioner was illiterate accentuated the unfairness of trying him without counsel); *Von Moltke v. Gillies*, 332 U.S. 708, 720 (1948) ("This Court has been particularly

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See Patterson, 487 U.S. at 297 n.9; *United States v. Red Bird*, 287 F.3d 709, 716 (8th Cir. 2002).

solicitous to see that [the Sixth Amendment] right was carefully preserved where the accused was ignorant and uneducated....").

Without the protection of the attorney-client relationship provided by the *Jackson* rule, the Sixth Amendment right to the assistance of counsel will become, for many vulnerable defendants, nothing more than an abstraction.

II. Empirical Evidence Demonstrates That The *Jackson* Rule Is Particularly Important For Vulnerable Defendants.

Empirical evidence casts in stark relief the dangers that overruling *Jackson* would pose for mentally and developmentally disabled defendants, juveniles, those lacking education, those with substance addictions, the indigent, and other vulnerable defendants. Many such defendants have no understanding of their legal rights or of the role of counsel. They also share characteristics that make them highly suggestible and disposed to defer to authority figures, leading to waiver of rights and, in a disturbing number of cases, to false confessions and wrongful convictions.

Overruling *Jackson* would be particularly detrimental for such defendants because of the confusing instructions regarding counsel that they would receive. At the initial hearing, they would likely learn that an attorney was being appointed for them. In a later custodial interrogation, however, they would be informed in the traditional manner of "their right to counsel" and right to have counsel "appointed" if they are indigent, notwithstanding that counsel had already been appointed in open court. These conflicting statements would be confusing to anyone, but would be especially baffling to defendants with mental disabilities or other impairments.

A. The Most Vulnerable Defendants Are Unable To Understand Their Rights In The Absence Of Counsel.

Numerous studies have demonstrated that juveniles and those with mental deficits are particularly vulnerable in confrontations with police without counsel present because they are often unable to understand the warnings that are recited. This vulnerability carries significant ramifications: if *Jackson* is overruled, the Sixth Amendment right to counsel will hinge, not only on a defendant's understanding of the importance of counsel, but also on the understanding that the previous appointment of counsel was not sufficient to prevent police from initiating interrogation in counsel's absence.[4] The evidence is clear that the most vulnerable defendants cannot comprehend the significance of the right to counsel in the abstract, let alone the right's significance when the police confront them in counsel's absence.

In a study of how mental disabilities affect the ability to comprehend the *Miranda* warnings, mentally disabled subjects and control subjects were given a series of tests that measured their understanding of (1) the vocabulary used in the *Miranda* warnings; (2) the principles embodied in the warnings; and (3) the legal context of the criminal justice system. Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. Chi. L. Rev. 495, 532–34 (2002). Subjects in the mentally disabled group averaged 20% on the first test, compared to 83% for the controls; 27% on the second test, compared to 90% for the controls; and 38% on the third test, compared to 87% for the controls. *Id.* at 539. On the section designed to test their understanding of the right to counsel, mentally disabled subjects averaged 35%, compared to 93% for the controls. *Id.* at 556–57. Of the disabled group in the study, 22% had IQs somewhat higher than the standard cutoff for mental retardation (70), but these subjects nevertheless scored poorly. *Id.* at 535–57.

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[4] Knowledge that a defendant has had counsel appointed is imputed to the police under the Sixth Amendment. *See Jackson*, 475 U.S. at 634.

Like mentally disabled defendants, juvenile defendants often do not understand the right to counsel. A study of juveniles' understanding of their *Miranda* rights found that "as a class, juveniles younger than [15] failed to meet both the absolute and relative (adult norm) standards for comprehension." Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Cal. L. Rev. 1134, 1152 (1980). The study found that the least understood of the *Miranda* rights was the right to counsel during questioning. *Id.* at 1154. Even an expression of understanding by a juvenile "may reflect compliance with authority rather than an actual subjective appreciation of the meaning of the warning." Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 Minn. L. Rev. 26, 44, 78 (2006). These studies confirm what this Court observed long ago:

> [A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police .... [He] is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded, and ... is unable to know how to protest his own interests or how to get the benefits of his constitutional rights.

Gallegos v. Colorado, 370 U.S. 49, 54 (1962).

Although research has traditionally focused on the mentally disabled and juveniles, recent studies indicate that mentally ill defendants who are not retarded also often are unable to understand *Miranda* warnings.[5] *See* William C. Follette, Deborah Davis & Richard A. Leo, *Mental Health Status and Vulnerability to Police Interrogation*

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[5] In 2005, more than half of all prison and jail inmates had a mental health problem. Doris J. James & Lauren E. Glaze, U.S. Dept. of Justice, NCJ 213600, *Mental Health Problems of Prison and Jail Inmates* (2006), at 1, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf. Approximately 43% of State prisoners and 54% of jail inmates reported symptoms meeting the criteria for mania. *Id.* Approximately 15% of State prisoners and 24% of jail inmates reported symptoms meeting the criteria for a psychotic disorder. *Id.*

Tactics, 22 Crim. Just. 42, 45–46 (Fall 2007); Richard Rogers, et al., *Knowing and Intelligent: A Study of Miranda Warnings in Mentally Disordered Defendants*, 31 Law & Hum. Behav. 401, 401 (2007).

Assistance of counsel is necessary to address the severe vulnerabilities of such defendants. *See, e.g.*, Grisso, *supra*, at 1160–64 (finding that "the requirement that counsel be present [during interrogation] affords the best protection for juveniles under the age of fifteen"). The *Jackson* rule is thus particularly critical for these groups.

B. Overruling *Jackson* Would Lead To More False Confessions And Wrongful Convictions.

Police attempts to obtain an adversarial advantage by interrogating defendants without counsel present create perilous risks for the accused. As this Court recently observed, the coercive pressures of custodial interrogation "can induce a frighteningly high percentage of people to confess to crimes they never committed." *Corley v. United States*, 556 U.S. __, No. 07-10441, slip op. at 16 (Apr. 6, 2009) (citing Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 906–07 (2004)); *see also* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. __ (2009) (forthcoming), *available at* http://ssrn.com/abstract=1280254, at 1 (finding that, of 232 individuals exonerated by post-conviction DNA testing, 32—or about 15%—had falsely confessed).[6] Vulnerable defendants such as those discussed above are particularly likely to confess falsely. A recent study found that of 34 individuals who had falsely confessed and were exonerated by post-conviction DNA evidence, 20 were either mentally retarded or juveniles or both at the time of the offense.[7] Garrett, *supra,* at 10; *see also* Samuel R. Gross, et al., *Exonerations in the United States 1989-2003*, 95 J. Crim. L. & Criminology 523, 544–46 (2005) (in a study of 340 exonerations over 15 years, finding that 42% of juvenile exonerees and 69% of mentally ill and mentally retarded exonerees falsely confessed, compared to 8% of adult exonerees without known mental disabilities).

This Court has recognized the particular problem of false confessions among mentally disabled defendants. *See Atkins*, 536 U.S. at 320 & n.25. One study of false confessions found that at least 28 out of 125 defendants who had falsely confessed, or 22% of the total, were mentally retarded. *See* Drizin & Leo, *supra*, at 891, 971; *see also* Garrett, *Judging Innocence*, 180 Colum. L. Rev. 55, 88–89 (2008).

Mentally disabled defendants share a number of characteristics that make them vulnerable to police pressure, including susceptibility to the perceived wishes of authority figures; eagerness to please others; inability to discern adversarial situations; poorly formed notions of personal culpability, resulting in a willingness to assume blame for actions of others; lack of focus and impulse control; inability to judge their own capacities; and desire to hide their disability. *See* Cloud et al., *supra*, at 511–14. As a result, "[i]t is common for mentally retarded suspects to succumb to coercive attempts to elicit confessions." Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R.-C.L. L. Rev. 105, 123 (1997).

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[6] Research indicates that the innocent are particularly likely to waive their *Miranda* rights because they assume that their innocence will protect them. *See* Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?* 60 Am. Psychologist 215, 218-19 (April 2005).

[7] All 34 of these individuals had waived their *Miranda* rights and lacked counsel before confessing. Garrett, *supra,* at 4.

Juveniles face a similar risk. *See* Drizin & Leo, *supra*, at 944. Juveniles are socialized to comply with adults' perceived wishes, especially those of authority figures such as police officers. *See* Feld, *supra*, at 57-58; *see also Roper v. Simmons*, 543 U.S. 551, 569 (2005) ("[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.").[8] Juveniles have a tendency to change their recollection of events in the face of negative feedback and repeated questions. *See* Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 16 (1997); Rachel Sutherland & Harlene Hayne, *Age-Related Changes in the Misinformation*

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[8] At least one scholar has argued that this Court's decision in *Roper* signals the need for heightened protection of juveniles during custodial interrogation. *See* Tamar R. Birkhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 Wash. & Lee L. Rev. 385 (2008).

Effect, 79 J. Exp. Child Psychol. 388, 388–404 (2001). Moreover, many juveniles do not fully understand the consequences of their actions—in one study of more than 400 subjects, juveniles who were asked the consequences of waiving their right to silence most often focused on the immediate police response rather than on the long-term impact of the decision. *See* Thomas Grisso, *Juvenile Competency to Stand Trial*, 12 Crim. Just. 5, 9 (1997) (internal citation omitted); *see also Johnson v. Texas*, 509 U.S. 350, 367 (1993) ("A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults .... These qualities often result in impetuous and ill-considered actions and decisions.").

Other particularly vulnerable groups, such as mentally ill defendants and defendants with substance abuse problems, also may exhibit characteristics that lead to false confessions, including impulsivity, deficits in cognitive processing, suggestibility, delusions and extreme compliance. Follette, et al., *supra*, at 46–49 (discussing defendants with substance addictions, schizophrenia, clinical depression, and anxiety disorders, among other conditions).

Case studies of defendants who confess falsely demonstrate the vulnerabilities that lead to such confessions. One 13-year-old "was so upset by his unfair arrest and the police officers' unwillingness to accept his innocence, he made a false statement he imagined he could withdraw after he got home where his family would believe him." Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 Crim. Just. 26, 33 (2000). A learning disabled sixteen-year-old who confessed falsely to a murder later said: "They kept telling me I know you did it so why are you lying to me. They had me so upset I wasn't thinking right . . . [I]f I said, yeah, I did it, I could go home. If I said I didn't do it, I could go to jail so I said I did it and I want to see my parents and everything." Drizin & Leo, *supra*, at 970 (quoting *20-20* ABC television broadcast, Mar. 15, 2002) (internal quotation marks omitted) (alterations in original). Jerry Townsend, a mentally retarded man who served 22 years in prison before being cleared by DNA evidence, confessed to each of the approximately 20 unsolved murders that police asked him about. Garrett, *The Substance of False Confessions*, *supra*, at 10, 32, 46.

False confessions do not result only from police coercion. Without counsel present, police officers or prosecutors who are convinced that a defendant is guilty may, unwittingly or otherwise, feed the defendant facts about the crime. A suggestible defendant may then repeat the facts in a confession. Marcellius Bradford, aged 14, initially stated during interrogation that the murder weapon in an Illinois rape and murder case was a brick. *Id.* at 14. The police knew that a piece of concrete with human blood was recovered from the crime scene. *Id.* at 13. The State attorney asked Bradford: "Was this brick a piece of concrete from the ground?" *Id.* at 14. Bradford responded that it was. *Id.* Based on the confession of Bradford and another 14-year old boy, they and two other boys were convicted and served

6.5 to 13.5 years in jail, until DNA evidence exonerated them. *Id.* at 13.[9]

Without the protection of the attorney-client relationship provided by the *Jackson* rule, false confessions and wrongful convictions will undoubtedly become even more common.

C. Indigent Defendants Are Vulnerable Because They Often Face Prolonged Detention Without Any Contact with Counsel.

Indigent defendants face an increased risk of uninformed waiver of counsel because they are less likely than other defendants to have had any meaningful contact with counsel by the time they are subject to interrogation.[10]

According to a Department of Justice study of pre-trial detainees in 1989, 34% of detainees with assigned counsel had not met with their attorneys more than two weeks after detention, compared with 19% of those with hired counsel. Steven K. Smith &

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[9] Police provision of a confession's crucial details is a common feature of false confession cases, including multiple cases in Louisiana, Michigan, New York, Virginia, and Pennsylvania. *Id.* at 13-26.

[10] The population of indigent defendants is substantial. In 2000, approximately 66% of felony defendants in federal court and 82% of felony defendants in large state courts were represented by publicly financed counsel at the end of their case. Caroline W. Harlow, U.S. Dep't of Justice, NCJ 179023, *Defense Counsel in Criminal Cases* (2000), at 1, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf.

Carol J. DeFrances, U.S. Dep't of Justice, NCJ 158909, *Indigent Defense* (1996), at 4 tbl. 7, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/id.pdf. The numbers are far worse in certain jurisdictions. One report states that in 83% of the cases in Calcasieu Parish, Louisiana, "there is nothing to suggest that a public defender ever met his indigent client out of court." Standing Comm. on Legal Aid & Indigent Defendants, Am. Bar Ass'n, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* 16 (2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf. A study of prisoners who were detained pre-trial in Orleans Parish, Louisiana, when Hurricane Katrina struck and remained incarcerated six months later found that none had met with a lawyer in the six months since Katrina, and the vast majority had not seen a public defender outside of a courtroom in the six months before Katrina. S. Ctr. for Human Rights, *A Report on Pre- and Post-Katrina Indigent Defense in New Orleans* (March 2006), at 5; *see also* Eric Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. Times (Nov. 8, 2008) at A1 (reporting that "[p]ublic defenders' offices in at least seven states are refusing to take on new cases or have sued to limit them, citing overwhelming workloads that they say undermine the constitutional right to counsel for the poor").[11]

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[11] Compounding the risk of uninformed waiver of counsel, defendants with vulnerabilities such as mental illness are far more likely than other defendants to be indigent. *See* Seth J. Prins & Laura Draper, *Improving Outcomes for People with Mental Illnesses under Community Corrections Supervision: A*
(...continued)

The right to counsel is necessarily abstract to a defendant who has never met or spoken with counsel. Moreover, defendants who have been held for days or weeks without meaningful interaction with counsel—after having been told that a lawyer would be appointed to assist them—become receptive to police suggestions that their lawyer cannot or is not interested in helping them, making waiver and false confessions more likely. *See* Drizin & Leo, *supra*, at 918 (noting that a feeling of hopelessness is a primary cause of false confessions).

D. The Facts Of This Case Illustrate The Inadequacy Of Fifth Amendment Protections For Vulnerable Defendants Facing Formal Adversary Proceedings.

Petitioner's case exemplifies the way that police can circumvent counsel's role "as a 'medium' between [the defendant] and the State," *Moulton*, 474 U.S. at 176, a practice that will become commonplace if *Jackson* is overruled.

Guide to Research-Informed Policy and Practice (2009), at 13, *available at* http://nicic.gov/Downloads/PDF/Library/023634.pdf ("Of local jail detainees, 30 percent with mental illnesses, compared with 17 percent without mental illnesses, had been homeless in the year before their arrest."); Bureau of Justice Statistics, U.S. Dep't of Justice, *More than a Quarter Million Prison and Jail Inmates are Identified as Mentally Ill* (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/press/mhtip.pr (noting that in 1998, about 40 percent of mentally ill prison and jail inmates were unemployed before their arrest).

By confronting petitioner before his lawyer could meet him and falsely telling him that no lawyer had been appointed, Pet. App. 49a, the police "intentionally creat[ed] a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel," in violation of the Sixth Amendment. *Henry*, 447 U.S. at 274. The police deliberately set out to eliminate the protective presence of counsel by confronting petitioner before he had an opportunity to meet with his appointed counsel and convincing him that invoking his right to counsel would be futile. Pet. App. 49a.

Similar scenarios will be commonplace if this Court overrules *Jackson*, as the police will seek to extract confessions from represented defendants before counsel has had an opportunity to assist them. Even where officers do not intend to circumvent the right to counsel, particularly vulnerable defendants will make uninformed waivers and false confessions at significantly higher rates than they do today. The Sixth Amendment right to the assistance of counsel will be rendered illusory for many defendants, as it was for petitioner here.

CONCLUSION

This Court's holding in *Michigan v. Jackson*, 475 U.S. 625 (1986), should not be overruled.

Respectfully submitted,

BARBARA BERGMAN
Co-chair, Amicus Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1117 Stanford, N.E.
Albuquerque, N.M. 87131
(505) 277-3304

STEVEN SHAPIRO
ROBIN DAHLBERG
AMERICAN CIVIL LIBERTIES
UNION NATIONAL LEGAL
OFFICE
125 Broad Street
18th Floor
New York, NY 10004
(212) 549-2500

KATIE SCHWARTZMANN
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
LOUISIANA
PO Box 56157
New Orleans, LA 70156
(504) 592-8056

JONATHAN L. MARCUS
Counsel of Record
ANNA E. LUMELSKY
GARY FELDON
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

DAVID S. UDELL
MELANCA CLARK
BRENNAN CENTER FOR
JUSTICE AT NYU SCHOOL OF
LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6730

SIDNEY S. ROSDEITCHER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

STEPHEN B. BRIGHT
WILLIAM R. MONTROSS, JR.
SOUTHERN CENTER FOR
HUMAN RIGHTS
83 Poplar Street, NW
Atlanta, GA 30303
(404) 688-1202

APRIL 2009 *Counsel for Amici Curiae*

AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
FILED
APR 13 2009
OFFICE OF THE CLERK

No. 07-1529

In The
Supreme Court of the United States

◆

JESSIE JAY MONTEJO,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

◆

**On Writ Of Certiorari
To The Supreme Court Of Louisiana**

◆

SUPPLEMENTAL BRIEF FOR THE STATES OF NEW MEXICO, ALABAMA, COLORADO, DELAWARE, FLORIDA, KANSAS, PENNSYLVANIA, UTAH, WASHINGTON, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

◆

GARY K. KING
Attorney General of New Mexico

M. VICTORIA WILSON
Counsel of Record
Assistant Attorney General
111 Lomas Blvd. NW, Suite 300
Albuquerque, NM 87102
(505) 222-9052

Counsel for Amici Curiae

[Additional Counsel On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TROY KING
Attorney General of Alabama

JOHN SUTHERS
Attorney General of Colorado

RICHARD S. GEBELEIN
Chief Deputy Attorney General
STATE OF DELAWARE

BILL McCOLLUM
Attorney General of Florida

STEVE SIX
Attorney General of Kansas

THOMAS W. CORBETT, JR.
Attorney General
COMMONWEALTH OF PENNSYLVANIA

MARK L. SHURTLEFF
Utah Attorney General

ROBERT M. McKENNA
Attorney General of Washington

BRUCE A. SALZBURG
Wyoming Attorney General

SUPPLEMENTAL QUESTION PRESENTED

Should *Michigan v. Jackson*, 475 U.S. 625 (1986), be overruled?

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INTEREST OF THE *AMICI CURIAE*

The *Amici* States have a direct interest in this case because resolution of the question whether *Michigan v. Jackson* should be overruled will affect the States' "compelling interest in finding, convicting, and punishing those who violate the law." *See Moran v. Burbine*, 475 U.S. 412, 426 (1986).

◆

SUMMARY OF THE ARGUMENT

In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court adopted the rule that police may not ask a formally-charged defendant to answer questions without counsel present when the defendant requested the assistance of counsel at arraignment. The rule is designed to protect defendants from police coercion in obtaining a waiver of the right to counsel, and is based on the premise that "suspects who assert their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations". *Michigan v. Harvey*, 494 U.S. 344, 350 (1989).

Jackson's premise, borrowed from *Edwards v. Arizona*, 451 U.S. 477 (1981), bears no relationship to its goal of preventing coerced waivers of the right to counsel. The presumption of *Edwards*, that a second request for a waiver of the right to counsel is coercive, is justified when the defendant's response to an initial request notifies the police of the defendant's choice to speak to police only through counsel. Yet, the *Jackson* rule is triggered by a general assertion of the right to counsel made to a judge at a stage of the prosecution other than the interrogation. Thus, the rationale that supports the *Edwards* rule is entirely lacking in the Sixth Amendment context. *Jackson* was wrongly decided and, therefore, should be overruled.

Additional reasons for overruling *Jackson* include developments in the law that have undermined the doctrinal underpinnings of *Jackson* and that have dispelled the notion that the Sixth Amendment protects the attorney-client relationship. Since deciding *Jackson*, the Court has abandoned its view that counsel's role in pretrial interrogation is "vitally important", *Massiah v. United States*, 377 U.S. 201, 206 (1964), and has found, instead, that counsel's role in pretrial interrogation is "relatively simple and limited", *Patterson v. Illinois*, 487 U.S. 285, 299-300 (1988). That change undermines the doctrinal underpinnings of *Jackson*, which find their roots in *Massiah*. In addition, since deciding *Jackson*, the Court has held that the Sixth Amendment right to counsel is offense specific and, thus, police may question a represented defendant about uncharged crimes. *Texas v. Cobb*, 532 U.S. 162 (2001). The Court has also recognized that a formally-charged defendant may initiate police questioning, even if he has retained or requested counsel. *Harvey*, 494 U.S. at 352. These decisions make clear that the Sixth Amendment does not protect the attorney-client relationship.

Two additional, related justifications for overruling *Jackson* are: (1) the *Jackson* rule has proven to be unworkable by the variety of procedures adopted by States to fulfill their obligation to provide counsel to indigent criminal defendants, and (2) overruling *Jackson* would not undermine defendants' Sixth Amendment right to have counsel present during an interrogation. The practical effect of overruling *Jackson* is that police would be allowed to ask a formally-charged defendant to waive his Sixth Amendment right and agree to answer questions without counsel present. The requirements of *Miranda* and *Edwards* ensure that such a waiver is made voluntarily, knowingly and intelligently.

◆

ARGUMENT

A person charged with committing a crime has the right to the assistance of counsel in defending against the charge. *See* U.S. Const. amend. VI; *Patterson*, 487 U.S. at 290. Like other constitutional rights, the right to the assistance of counsel in defense of criminal charges may be waived. *Harvey*, 494 U.S. at 352-353. Such a waiver is valid if it is given voluntarily, knowingly, and intelligently. *Patterson*, 487 U.S. at 296 (quoting *Moran* 475 U.S. at 422-423). In *Jackson*, however, the Court set-aside that fact-based test in favor of a supposedly bright-line prophylactic rule intended to prevent Sixth Amendment violations in pretrial interrogations. The Court held: "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police initiated interrogation is invalid." *Jackson*, 475 U.S. at 636.

◆

SPECIAL JUSTIFICATION EXISTS FOR OVERRULING *JACKSON*

As this Court has noted, "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensible." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992) (plurality opinion). Also necessary to the rule of law is the ability of the Court to revisit decisions that are "unworkable or badly reasoned", *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), particularly decisions interpreting the Constitution which "can be altered only by constitutional amendment or by overruling [ ] prior decisions", *Agostini v. Felton*, 521 U.S. 203, 235 (1997). Thus, the Court does not view *stare decisis* as an "inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne*, 501 U.S. at 828 (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

In *Casey*, the Court explained that reexamining a prior decision involves "a series of prudential and pragmatic considerations". *Casey*, 505 U.S. at 854. Those considerations include (1) whether the prior decision has proven to be unworkable, (2) whether reliance on the prior decision is such that overruling the decision would create inequitable hardship, and (3) whether the doctrinal underpinnings of the prior decision have been undermined by the development of the law or changes in how the facts are viewed in subsequent decisions. *See Casey*, 505 U.S. at 854-855. In addition, particularly in constitutional cases, the Court will consider whether the prior decision was wrongly decided. *See Payne*, 501 U.S. at 829-830.

Each of those considerations weighs in favor of overruling *Jackson*. First, *Jackson* was wrongly decided because it was based on the unsupported premise that a formally-charged defendant who asserts his right to counsel at an early stage of the prosecution would not willingly waive that right in a subsequent stage, and because the rule established in *Jackson* reaches beyond its intended purpose of preventing coerced waivers of the right to counsel during interrogation. Second, the doctrinal underpinnings of the decision in *Jackson* have been undermined by the Court's subsequent decisions. Third, the rule established in *Jackson* has proven to be unworkable. In addition, no equitable hardship would result from overruling *Jackson* because doing so would not adversely affect criminal defendants' Sixth Amendment right to counsel.

A. *Michigan v. Jackson* was wrongly decided.

The decision in *Jackson* involved the validity of a formally-charged defendant's waiver of the Sixth Amendment right to counsel during a police interrogation. *Jackson*, 475 U.S. at 636. The touchstone of a valid waiver of a constitutional right is that the waiver is voluntary, knowing and intelligent. *See Edwards*, 451 U.S. at 482. Borrowing from its Fifth Amendment jurisprudence, the Court in *Jackson* established a presumption that a waiver of the right to counsel during interrogation is not voluntary when obtained by police after the defendant has asserted his Sixth Amendment right to counsel. *See Harvey*, 494 U.S. at 350. *Jackson* was wrongly decided because that presumption does not logically apply in the Sixth Amendment context.

In the Fifth Amendment context, police are permitted to make one initial request for an uncharged suspect to waive his Fifth Amendment rights and talk to police without counsel present. If the suspect refuses to waive his rights and requests a lawyer, police may not make a second or subsequent request for a waiver.[1] *Edwards*, 451 U.S. at 484-485; *McNeil v. Wisconsin*, 501 U.S. 171 (1991). Thus, the

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[1] Except, perhaps, when there is a break in custody or a substantial lapse in time, as a second request under such circumstances would be consistent with the anti-badgering purpose of *Edwards*. *See Harvey*, 494 U.S. at 350 (recognizing the anti-badgering purpose of *Edwards*).

Court assumes that a subsequent request for a waiver is coercive. *See Harvey*, 494 U.S. at 350. To the extent that assumption is reasonable, it is so because it balances society's compelling interest in investigating, solving, and punishing criminal activity with a suspect's right to have counsel present during an interrogation. *See Moran*, 475 U.S. at 426. In furtherance of society's interest, police may make at least one request for a waiver; in furtherance of the individual's interest, police are prevented from badgering suspects into waiving their rights by repeatedly requesting waivers.

In *Jackson*, the Court applied the Fifth Amendment rule to the Sixth Amendment context. In so doing, however, the Court created a rule that prohibits police from making an initial request for an accused to waive his right to counsel during an interrogation. In contrast to the Fifth Amendment rule, which is triggered by a specific, unambiguous request to police for the assistance of counsel, the *Jackson* rule is triggered by a general assertion of the right to counsel made to a judge at an early stage in the proceedings. *Jackson*, 475 U.S. at 630-632. Because the assertion of the Sixth Amendment right occurs at a stage in the prosecution other than the interrogation, the Court must presume that, when a formally-charged defendant asserts the right to counsel at one stage, he intends the assertion to apply "at all critical stages of the prosecution." *Jackson*, 475 U.S. at 633. In adopting that assumption, the Court explained that the "standard for assessing waivers of constitutional rights" requires indulging "every reasonable presumption against the waiver." *Jackson*, 475 U.S. at 633 (quotation marks omitted).

The Court's analysis, however, failed to establish why the presumption is reasonable. As the *Jackson* dissent noted, the Fifth Amendment rule "does not arise until affirmatively invoked by the defendant during custodial interrogation." *Jackson*, 475 U.S. at 641 (Rehnquist, J., dissenting). In contrast, the *Jackson* rule is not tied to a request for counsel during a custodial interrogation. Rather, it is triggered by "the otherwise legally insignificant request for counsel" at arraignment. *Id.* at 642. Thus, the dissent further noted, there is "no satisfactory explanation" for extending "the *Edwards* rule to the Sixth Amendment," while limiting "that rule to those defendants foresighted enough, or just plain lucky enough, to have made an explicit request for counsel" which is "completely unnecessary for Sixth Amendment purposes." *Id.* at 642. Justice Kennedy made a similar observation in his concurring opinion in *Cobb*, stating:

> [T]he acceptance of counsel at arraignment or similar proceeding only begs the question: acceptance of counsel for what? It is quite unremarkable that a suspect might want the assistance of an expert in the law to guide him through hearings and trial, and the attendant complex legal matters that might arise, but nonetheless might choose to give

> on his own a forthright account of the events that occurred.

Cobb, 532 U.S. at 177 (Kennedy, J., concurring).

Indeed, it is entirely logical that a defendant would attempt to maintain some control over the course of an investigation through his statements to the police. *See Moran*, 475 U.S. at 426 (*Miranda* gives "the *defendant* the power to exert some control over the course of the interrogation."). Moreover, as this Court has acknowledged, "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good". *McNeil*, 501 U.S. at 181 (quotation marks omitted). "Admissions of guilt resulting from valid *Miranda* waivers are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Id.* (quotation marks omitted). Thus, "[a] court-made rule that prevents a suspect from even making this choice serves little purpose, especially given the regime of *Miranda* and *Edwards*." *Cobb*, 532 U.S. at 177 (Kennedy, J., concurring).

As noted above, a defendant may waive his rights under both the Fifth and Sixth Amendments. An unambiguous assertion of those rights notifies police that the defendant does not wish to waive his constitutional rights and, therefore, justifies a presumption that most subsequent attempts to obtain a waiver are coercive. *See Davis v. United States*, 512 U.S. 452, 458-460 (1994). However, the presumption adopted in *Jackson* – that a defendant who requests counsel at arraignment would not willingly agree to an uncounseled interrogation – bypasses the necessity of an unambiguous assertion of the right. Therefore, the rationale supporting the presumption that subsequent attempts to obtain a waiver are coercive is lacking in the Sixth Amendment context. Just as an initial request for a waiver of the Fifth Amendment right to counsel during an interrogation is not presumptively coercive, an initial request for a waiver of the Sixth Amendment right to counsel during interrogation, likewise, is not presumptively coercive. *Jackson* presumed otherwise and, therefore, was wrongly decided.

B. Developments in the law have undermined the doctrinal underpinnings of *Jackson* and have dispelled the notion that the Sixth Amendment protects the attorney-client relationship.

1. The doctrinal underpinnings of *Jackson* are found in the Court's decision in *Massiah*, in which the Court first recognized that the Sixth Amendment protects a formally-charged defendant's right to communicate with police only through counsel. *Massiah*, 377 U.S. at 206. In *Massiah*, the Court held that the police violate a defendant's Sixth Amendment right by "deliberately elicit[ing]" information from him in the absence of his retained counsel after he has been indicted. *Id.* In so holding, the Court viewed counsel's participation in pretrial interrogation as "vitally important" to "perhaps the most critical period of the proceedings" – the time between arraignment and commencement of the trial. *Id.* at 205 (quotation marks omitted).

The Court has since modified its view of the role of counsel during a pretrial interrogation. In *Maine v. Moulton*, the Court recognized "that the right to counsel is shaped by the need for the assistance of counsel". 474 U.S. 159, 170 (1985) (quotation marks omitted). In *Patterson*, the Court described its inquiry as "a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." *Patterson*, 487 U.S. at 298. Following this approach, the Court found that "the role of counsel at questioning is relatively simple and limited" and that there is "no problem in having a waiver procedure at that stage which is likewise simple and limited." *Id.* at 300. In so doing, the Court contrasted the simple procedure sufficient for a valid waiver of the right to counsel during interrogation with the elaborate procedure required for waiving the right to counsel during trial. The Court explained,

> [W]e require a more searching or formal inquiry before permitting an accused to waive his right to counsel at trial than we require for a Sixth Amendment waiver during post-indictment questioning – *not* because postindictment questioning is less important than at trial . . . but because the full dangers and disadvantages of self-representation during

> questioning are less substantial and more obvious to an accused than they are at trial.

Id. at 299-300 (citation and quotation marks omitted).

The view expressed in *Patterson* is a substantial change from the view stated in *Massiah*. Moreover, it is a change that undermines the central premise of *Jackson*. As noted above, the central premise of *Jackson* is that a defendant who invokes the right to counsel at arraignment would not willingly waive the right to counsel during an interrogation. That premise is based on the view expressed in *Massiah* that counsel's role in a pretrial interrogation is as vital to the defense as counsel's role at trial. Considering the Court's revised view that counsel's role in pretrial interrogation is less vital to the defense than counsel's role at trial, the premise of *Jackson* is no longer justified (if it ever was).

2. In *Jackson*, the Court relied on the principle that a formally-charged defendant has "'the right to rely on counsel as a "medium" between him and the State.'" *Jackson*, 475 U.S. at 632 (quoting *Moulton*, 474 U.S. at 176). The Court cited that principle in *Patterson* to suggest, in dictum, that the Sixth Amendment protects "the sanctity of the attorney-client relationship". *Patterson*, 487 U.S. at 290 n.3 (citing *Moulton*, 474 U.S. at 176). However, this suggestion was not only inconsistent with the Court's rationale in *Patterson* itself, but has also been dispelled by subsequent decisions.

In *Patterson*, the defendant argued that "because his Sixth Amendment right to counsel arose with his indictment, the police were thereafter barred from initiating a meeting with him." *Patterson*, 487 U.S. at 290. The Court rejected that argument as inconsistent with *Edwards* and, by extension, with *Jackson*. *Id*. at 291. In so doing, the Court explained that, once the accused has "expressed a desire to communicate with police only through counsel", *Edwards* bars police-initiated interrogation, but does not bar questioning initiated by the accused. *Id*. The Court further explained that "[p]reserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny – not barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Id*. (emphasis in original).

That explanation is inconsistent with the notion that the Sixth Amendment protects the attorney-client relationship. First, the Court has clearly indicated that the Sixth Amendment protection is afforded to the "accused's choice to communicate with police only through counsel". *Id*. That is consistent with the Court's recognition that a defendant may waive his right to counsel during an interrogation. *See Brewer v. Williams*, 430 U.S. 387, 404 (1977); *Moran v. Burbine*, 475 U.S. at 428; *Patterson*, 487 U.S. at 293. Moreover, protection of the accused's choice is far different from protection of the attorney-client relationship. If it is the attorney-client relationship that is protected by the Sixth Amendment, then an accused who has retained counsel or has been appointed counsel could not make the choice to speak to police without counsel and initiate questioning. This Court has rejected such a result. *See Patterson*, 487 U.S. at 290; *Moran*, 475 U.S. at 430-431. As the Court stated in *Harvey*, "nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of counsel." *Harvey*, 494 U.S. at 352.

The notion that the Sixth Amendment protects the attorney-client relationship is also inconsistent with the Court's decisions establishing the point at which the constitutional right to counsel attaches. The Sixth Amendment right to counsel attaches at the initiation of a criminal prosecution, which may occur "by way of formal charge, preliminary hearing, indictment, information, or arraignment", or by the "defendant's initial appearance before a judicial officer". *Rothgery v. Gillespie County, Texas*, 128 S.Ct. 2578, 2583, 2592 (2008) (quotation marks omitted). The right is "offense specific", that is, it "cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced" and it attaches only to the offense charged. *McNeil*, 501 U.S. at 175. Therefore, when a suspect has been indicted on one charge and has retained or requested counsel to assist his defense against that charge, police may initiate an interrogation of the suspect regarding a crime not charged in the indictment. *Id.* at 175-176.

Such interrogation is allowed even when the uncharged crime was allegedly committed in the same course of events as the charged crime, as long as the uncharged crime that is the subject of the police-initiated interrogation is a separate offense, as defined by the *Blockberger* test. *Cobb*, 532 U.S. at 173. These decisions dispel the notion that the Sixth Amendment protects the attorney-client relationship because they do not turn on the existence of such a relationship. Indeed, these decisions allow police-initiated interrogation in spite of the existence of the attorney-client relationship. Therefore, the Court should reject any suggestion that *Jackson* should not be overruled because it protects the attorney-client relationship.

C. The rule established in *Michigan v. Jackson* has proven to be unworkable.

Two conditions are necessary for the application of the *Jackson* rule: (1) the defendant's Sixth Amendment right to counsel must have attached at some time before the interrogation, and (2) the defendant must have asserted his right to counsel at an earlier stage of the proceedings, such as arraignment. These conditions render the *Jackson* rule unworkable.

As noted above, the Sixth Amendment right to counsel attaches at the initiation of a criminal prosecution, which may occur through an indictment or information, a preliminary hearing, an arraignment, or other initial appearance before a judicial officer. *Rothgery*, 128 S.Ct. at 2583, 2592. The defendant's presence is not required at every stage at which attachment may occur, such as the filing of an indictment or information. As a result, not all defendants have the opportunity to assert the right to counsel at the time the right attaches. Indeed, a post-indictment interrogation may be the first opportunity for many formally-charged defendants to assert the right to counsel.

Petitioner suggests that this problem demonstrates the unfairness of requiring an affirmative assertion of the right to trigger the *Jackson* rule. *Amici* suggest, however, that this problem demonstrates the unreasonableness of applying the *Edwards* rule to the Sixth Amendment. As discussed above, applying the *Edwards* rule to the Sixth Amendment prevents police from seeking an initial waiver of the right to have counsel present during interrogation. This result is unreasonable because it does not provide protection of that right that is not already provided by *Miranda* and *Edwards, see Cobb*, 532 U.S. at 175 (Kennedy, J., concurring), but it imposes a substantial cost on society's interest in effective law enforcement, *see McNeil*, 501 U.S. at 181 (rejecting a request to abandon the requirement under *Jackson* of the attachment of the right because doing so would seriously impede effective law enforcement).

Moreover, because the right to counsel may attach when the defendant does not have an opportunity to assert the right, it is unreasonable to impute to the police the knowledge of the defendant's assertion. For example, because the Court has equated the act of retaining counsel with an assertion of the right to counsel, *Moulton*, 474 U.S. at 162, 171, a defendant charged by indictment may assert the right simply by retaining counsel. There is no reason to assume that the police would have knowledge of that act and imputing knowledge would be patently unreasonable.

This case illustrates how the *Jackson* rule is unworkable. Having been told by this Court that it must provide counsel to indigent criminal defendants, *Gideon v. Wainwright*, 372 U.S. 335 (1963), the State of Louisiana adopted a rule with the express purpose of ensuring that it fulfills its obligation – the rule requiring a hearing to appoint counsel within 72 hours of arrest. Under this rule, appointment is automatic and requires no request by the defendant. Other states employ different procedures, some requiring a request, others making appointment automatic. To accommodate the variety of procedures adopted by states to ensure that their obligation to provide counsel to indigent criminal defendants is met, the Court employs two sweeping assumptions. The Court assumes that police are aware of a defendant's assertion of the right regardless of the circumstances surrounding the assertion. *Jackson*, 475 U.S. at 634. The Court also assumes that any request for counsel is intended to apply to all stages of the prosecution, including interrogation, regardless of the circumstances surrounding the request. *Jackson*, 475 U.S. at 633. In addition, for *Jackson* to apply in this case, the Court must assume that Petitioner's acquiescence in the automatic appointment was a request for counsel intended to apply to all stages of the prosecution, including pretrial interrogation. The fact that assumptions are necessary to the implementation of the *Jackson* rule demonstrates the unworkability of the *Jackson* rule and belies the Court's view that it is a "bright-line" rule.

Overruling *Jackson* would leave formally-charged defendants with the protections provided by *Miranda* and *Edwards* and would eliminate the necessity of making assumptions about the defendant's intent or willingness to speak to police without counsel or about the knowledge of police regarding the defendant's intent. Thus, overruling *Jackson* would leave in place a truly administrable bright-line rule, not merely the hope of one.

D. Overruling *Michigan v. Jackson* would not undermine criminal defendants' Sixth Amendment right to counsel.

Overruling *Jackson* would simply allow police to ask a formally-charged defendant to waive his right to counsel during interrogation. When a defendant agrees to such a request, he must do so voluntarily, knowingly, and intelligently. *Patterson*, 487 U.S. at 292. *Miranda* warnings, which are constitutionally required, *Dickerson v. United States*, 530 U.S. 428 (2000), inform the defendant of his right to counsel during interrogation and the consequences of waiving that right, thus ensuring that a waiver is knowing and intelligent. *See Patterson*, 487 U.S. at 293-294.

Miranda warnings also ensure that the defendant's waiver is the result of his own free-will and not the result of police coercion. *See Colorado v. Spring*, 479 U.S. 564, 573-574 (1987).

Overruling *Jackson* would not undermine the distinctions this Court has drawn between Fifth and Sixth Amendment rights. For example, "the surreptitious employment of a cellmate, or the electronic surveillance of conversations with third parties may violate the defendant's Sixth Amendment right to counsel even though the same methods of investigation might have been permissible before arraignment or indictment." *Jackson*, 475 U.S. at 632 (citations omitted). Similarly, although a postindictment lineup does not implicate the Fifth Amendment, it does implicate the Sixth Amendment because it is a critical stage of the proceedings. *Id.* at 632 n.5 (citing *United States v. Wade*, 388 U.S. 218 (1967)).

Overruling *Jackson* would not undermine these distinctions. When police surreptitiously obtain incriminating statements from a formally-charged defendant, for example, the police do not request or obtain a waiver of the right to counsel. Yet, without a valid waiver, the State cannot use the defendant's statements to prove the charges against him. In cases involving postindictment lineups, overruling *Jackson* would simply allow police to ask the defendant to participate in the lineup without counsel present. As in a postindictment interrogation, the defendant would have to voluntarily, knowingly, and intelligently waive the right to have counsel present during the lineup before the police could proceed.

This Court has recognized that voluntary statements by criminal defendants are a "proper element in law enforcement", *Miranda v. Arizona*, 384 U.S. 436, 478 (1966), and are "essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran*, 475 U.S. at 426. As a result, the Court balances society's compelling interest with the individual's Fifth and Sixth Amendment rights by recognizing that individuals may agree to waive their rights. *Id.* Overruling *Jackson* preserves that balance by allowing police to ask a formally-charged defendant to waive his right to counsel and answer questions without counsel present, while requiring the waiver to be voluntary, knowing and intelligent.

◆

CONCLUSION

Amici respectfully request the Court to overrule *Jackson*.

Respectfully submitted,

GARY K. KING
Attorney General of New Mexico

M. VICTORIA WILSON
Counsel of Record
Assistant Attorney General
111 Lomas Blvd. N.W., Suite 300
Albuquerque, NM 87102
(505) 222-9052

AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
FILED
APR 13 2009
OFFICE OF THE CLERK

No. 07-1529

In the Supreme Court of the United States

JESSE JAY MONTEJO, PETITIONER

v.

STATE OF LOUISIANA

(CAPITAL CASE)

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF OVERRULING *MICHIGAN* v. *JACKSON*

ELENA KAGAN
Solicitor General
Counsel of Record
RITA M. GLAVIN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

97891

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In the Supreme Court of the United States

No. 07-1529

JESSE JAY MONTEJO, PETITIONER

v.

STATE OF LOUISIANA

(CAPITAL CASE)

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF OVERRULING *MICHIGAN* v. *JACKSON*

By order dated March 27, 2009, the Court directed the parties and permitted amici to file briefs addressing the following question: "Should Michigan v. Jackson, 475 U.S. 625 (1986), be overruled?" In the view of the United States, *Michigan* v. *Jackson* was incorrectly decided and has been undermined by recent precedent. The decision therefore should be overruled.

INTEREST OF THE UNITED STATES

Michigan v. *Jackson* held that a defendant's waiver of his right to counsel under the Sixth Amendment is presumed invalid if the police initiate interrogation after he has asserted the right at an arraignment or similar proceeding. Because the Sixth Amendment applies to the federal government, the Court's resolution of that question implicates the conduct of federal criminal investigations and trials.

ARGUMENT

In *Michigan* v. *Jackson*, 475 U.S. 625 (1986), this Court established a prophylactic rule that automatically invalidates a criminal defendant's waiver of the right to counsel in police-initiated questioning that occurs after his Sixth Amendment right to counsel has attached and he has asserted that right at an arraignment or similar proceeding. *Id.* at 636. The question here is whether this Court should reconsider that holding. The answer is yes.

Under the doctrine of *stare decisis*, the Court generally does not overrule one of its prior decisions absent a special justification. *E.g.*, *Pearson* v. *Callahan*, 129 S. Ct. 808, 816 (2009). But *"[s]tare decisis* is not an inexorable command," and this Court has "never felt constrained" to follow a decision that has proven to be "badly reasoned," *Payne* v. *Tennessee*, 501 U.S. 808, 827-828 (1991) (internal quotation marks omitted), or that has had its underpinnings eroded by later precedent, *Agostini* v. *Felton*, 521 U.S. 203, 235-236 (1997). Because the Court's "interpretation [of the Constitution] can be altered only by constitutional amendment or by overruling [its] prior decisions," *id.* at 235, the Court's "considered practice [is] not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases," *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 543 (1962).

The Court should overrule *Michigan* v. *Jackson*. Although the Sixth Amendment affords criminal defendants a right to counsel at certain critical pre-trial stages, the Amendment should not prevent a criminal defendant from waiving that right and answering questions from police following assertion of that right at arraignment. *Jackson* serves no real purpose and fits poorly with this Court's recent precedent; although the decision only occasionally prevents federal prosecutors from obtaining appropriate convictions, even that cost outweighs the decision's meager benefits.

A. The Purpose Of The Sixth Amendment Right To Counsel Is To Protect The Adversary Process In Formal Criminal Proceedings

The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. As this Court has repeatedly noted, "the core purpose of the [Sixth Amendment] counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Cronic*, 466 U.S. 648, 654 (1984) (quoting *United States* v. *Ash*, 413 U.S. 300, 309 (1973)).

To protect the adversary process leading to criminal punishment, the Court has extended the right to the assistance of counsel to "certain critical pretrial proceedings," in which "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984) (internal quotation marks omitted; brackets in original). In a line of cases beginning with *Massiah* v. *United States*, 377 U.S. 201 (1964), the Court held that the right to counsel is violated when, after attachment of the right, police deliberately elicit statements (including during custodial interrogation). See *Fellers* v. *United States*, 540 U.S. 519, 523-524 (2004); *Michigan* v. *Harvey*, 494 U.S. 344, 348-349 (1990);

Kuhlmann v. *Wilson*, 477 U.S. 436, 457 (1986); *Maine* v. *Moulton*, 474 U.S. 159, 172-173 (1985); *United States* v. *Henry*, 447 U.S. 264, 270 (1980); *Brewer* v. *Williams*, 430 U.S. 387, 400-401 (1977).

As a result, if law enforcement agents deliberately elicit statements from a criminal defendant whose Sixth Amendment right to counsel has attached and who has not voluntarily, knowingly, and intelligently waived that right, then the Sixth Amendment renders those statements inadmissible in the prosecution's case in chief at trial. *E.g.*, *Harvey*, 494 U.S. at 348-349. That rule rests on the view that permitting the prosecution to use the defendant's statements as substantive evidence of guilt would undermine the ability of counsel to render assistance that contributes to a fair trial. See *id.* at 348.

In *Michigan* v. *Jackson*, 475 U.S. 625 (1986), this Court went a significant step further, holding that, even if the defendant waives his right to counsel and chooses to speak with the police, his waiver is presumed invalid if the police initiated interrogation after the defendant asserted his right to counsel at an arraignment or similar proceeding. *Id.* at 636; see *Harvey*, 494 U.S. at 345. The Court came to that conclusion by extending the prophylactic rule developed to protect the Fifth Amendment privilege against compelled self-incrimination in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), to the Sixth Amendment right to counsel. In *Edwards*, the Court held that a suspect in custody who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-485. That prophylactic rule was "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Harvey*, 494 U.S. at 350.

The *Jackson* Court decided that "the same rule applies to a defendant who has been formally charged with a crime and who has requested appointment of counsel at his arraignment," because "the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before." 475 U.S. at 626, 631. Giving "a broad, rather than a narrow, interpretation to a defendant's request for counsel," the Court "presume[d]" that a defendant who requests a lawyer at his arraignment "requests the lawyer's services at every critical stage of the prosecution," including police interrogation. *Id.* at 633. As a result, even if a defendant responds to police questioning by choosing to speak with police, expressly waives his Sixth Amendment right to counsel, and provides a voluntary confession to the charged crime, *Jackson* renders that confession inadmissible as substantive evidence at his trial. *Id.* at 635; *Harvey*, 494 U.S. at 345.

B. *Michigan* v. *Jackson*'s Rule Is Unnecessary Given The Purposes Of The Sixth Amendment And The Existence Of Other Strong Protections Against Coercion

The *Jackson* rule makes little sense in light of the purposes of the Sixth Amendment right to counsel and the myriad protections otherwise afforded to criminal defendants in custodial interrogation.

The text of the Sixth Amendment provides a criminal defendant with the right to counsel, but leaves to the courts the appropriate means of enforcing that guarantee. See U.S. Const. Amend. VI. To enforce the right to counsel, this Court long has held that, after the Sixth Amendment right to counsel has attached, law enforcement agents may not deliberately elicit statements from a criminal defendant in the absence of counsel or a valid waiver of the right to counsel and then use those statements as substantive evidence of guilt at the defendant's trial. *E.g.*, *Harvey*, 494 U.S. at 348-349. The Court also has held that, once the Sixth Amendment right to counsel has attached, law enforcement officers "may not interfere with the efforts of a defendant's attorney to act as a medium between [the defendant] and the State during the interrogation." *Moran* v. *Burbine*, 475 U.S. 412, 428-429 (1986) (internal quotation marks omitted). Those rules are consistent with the purpose of the Sixth Amendment guarantee, because if the government could gather evidence from the defendant before trial through circumvention of the defendant's right to counsel, the availability of counsel at the trial itself would be an illusory protection. *United States* v. *Wade*, 388 U.S. 218, 224 (1967).

But the Sixth Amendment does not require an additional, prophylactic rule that overrides a defendant's free choice to speak with the police, in police-initiated interrogation, simply because the defendant previously has requested counsel at an arraignment. The *Jackson* rule was based on the belief that the concern about coercion in the Fifth Amendment context is also present in the Sixth Amendment context. *Jackson*, 475 U.S. at 631-632. But that assumption is unfounded. The Sixth Amendment does not protect a defendant against official compulsion; it ensures that he will have the assistance of counsel to guide him through the intricacies of the trial process and ensure that his trial is fair. *E.g.*, *Cronic*, 466 U.S. at 654. That purpose provides no warrant for automatically invalidating a confession provided by a defendant who has been approached by the police and apprized of his right to counsel, and who nonetheless voluntarily decides to waive that right and speak with police officers.

The concern that a represented defendant will be coerced during custodial interrogation is addressed through this Court's Fifth Amendment rules. In particular, in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court established a number of prophylactic rights to protect a defendant's Fifth Amendment privilege against self-incrimination during custodial interrogation, including the right to have counsel present to counteract the "inherently compelling pressures" of custodial interrogation. *Id.* at 467. In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), the Court established a "second layer of prophylaxis," *McNeil* v. *Wisconsin*, 501 U.S. 171, 177 (1991), holding that when an accused "express[es] his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police," *Edwards*, 451 U.S. at 484-485.[1]

The *Jackson* Court's extension of *Edwards* to the Sixth Amendment context "cut the *Edwards* rule loose from its analytical moorings," *Jackson*, 475 U.S. at 640 (Rehnquist, J., dissenting). The *Edwards* rule was established "to prevent the police from effectively overriding a defendant's assertion of his *Miranda* rights by badgering him into waiving those rights." *Id.* at 638 (Rehnquist, J., dissenting) (internal quotation marks omitted); see *Harvey*, 494 U.S. at 350. But the Sixth Amendment right to counsel is about protecting the adversary process at trial, not about police "badgering," so application of the *Edwards* rule to the Sixth Amendment never made real sense.

---

[1] In *Maryland* v. *Shatzer*, No. 08-680, the Court has granted certiorari to consider whether *Edwards* protection terminates when there has been a break in custody or a significant lapse in time before the reinitiation of custodial interrogation. *Edwards* would continue to serve as an important supplemental safeguard even if the Court were to impose limits on its duration. Indeed, the *Edwards* rule would serve this function even if the Court were to modify it so as to permit police to seek to reinitiate interrogation after the occurrence of attenuating circumstances that prevent police badgering.

Concerns about police coercion are of course important, but they are well and amply addressed through the *Miranda* and *Edwards* rules. Of particular significance here, under *Edwards*, if a defendant receives *Miranda* warnings and invokes his right to counsel, then police questioning must cease and the police may not re-approach him while he remains in custody to seek a *Miranda* waiver. 451 U.S. at 484-485. That rule applies even if the police wish to re-approach the suspect to question him about a factually unrelated offense. See *Arizona* v. *Roberson*, 486 U.S. 675, 678, 680-681 (1988). And the *Edwards* rule continues to apply even if the suspect has had the opportunity to consult with counsel. *Minnick* v. *Mississippi*, 498 U.S. 146, 153-156 (1990). Those rules defuse the risk that a represented defendant would provide an invalid waiver of his rights because of police overreaching.[2]

---

[2] As the Court has observed, the Fifth Amendment *Miranda/Edwards* protections are both broader and narrower than the Sixth Amendment *Massiah* rule. They are broader because they apply to police questioning about *any* offense, not just the charged offense, and they are narrower because they apply only in the context of custodial interrogation. *McNeil*, 501 U.S. at 178; see *Fellers*, 540 U.S. at 523-524.

Further, the Due Process Clauses of the Fifth and Fourteenth Amendments serve as an additional check on police overreaching by prohibiting actual coercion. See, *e.g.*, *Mincey* v. *Arizona*, 437 U.S. 385, 398-399 (1978). Those myriad protections for criminal defendants during custodial interrogations make an additional prophylactic Sixth Amendment rule unnecessary. See *Texas* v. *Cobb*, 532 U.S. 162, 171 n.2 (2001).

The *Jackson* rule also runs counter to the general principle that criminal defendants may waive their constitutional[1] rights. The effect of the *Jackson* rule is to invalidate a concededly knowing and intelligent waiver of the right to counsel. This Court long has recognized that the Sixth Amendment right to counsel, like any other basic right of a criminal defendant, may be waived. See *Faretta* v. *California*, 422 U.S. 806, 833-835 (1975); see also *Peretz* v. *United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are * * * subject to waiver."). To the extent that concerns about police coercion justify invalidating a defendant's waiver of Fifth Amendment rights after he has requested counsel, no similar concerns in the Sixth Amendment context justify a special anti-waiver rule. See *Cobb*, 532 U.S. at 174-175 (Kennedy, J., concurring) ("[I]t is difficult to understand the utility of a Sixth Amendment rule that operates to invalidate a confession given by the free choice of suspects who have received proper advice of their *Miranda* rights but waived them nonetheless.").

Although the Sixth Amendment applies to police questioning beyond custodial interrogation, the Court has never held that such non-custodial questioning raises concerns about coercion. Those concerns arise from the fact of custody itself, see, *e.g.*, *Davis* v. *United States*, 512 U.S. 452, 458 (1994), and thus provide no justification for extending the *Edwards* rule to the Sixth Amendment context.

Jackson rests as well on an erroneous factual premise. The Court assumed that a defendant's assertion of his Sixth Amendment right to counsel in the formal context of a courtroom necessarily should carry over to police-initiated interrogation, thus "giv[ing] a broad, rather than a narrow, interpretation to a defendant's request for counsel." 475 U.S. at 633. But it is one thing to assume that a defendant who desires counsel in court for one hearing also desires it for other formal procedural encounters with prosecutors, and it is quite another thing to presume that the defendant who desires counsel in the formal criminal setting also feels the need for counsel in dealing with the police. A criminal defendant "might want the assistance of an expert in the law to guide him through hearings and trial, and the attendant complex legal matters that might arise, but nonetheless might choose to give on his own a forthright account of the events that occurred" to police. *Cobb*, 532 U.S. at 177 (Kennedy, J., concurring); see *McNeil*, 501 U.S. at 178 (making the same point).

Unlike the situation in *Edwards*, where the defendant has received warnings from the police and has made a clear and unambiguous assertion of his rights in custodial interrogation, *Davis* v. *United States*, 512 U.S. 452, 459 (1994), a defendant protected by *Jackson* has made no similar decision. *Cobb*, 532 U.S. at 176 (Kennedy, J., concurring). *Jackson* is triggered solely by a request for counsel at arraignment. The *Jackson* rule therefore precludes the defendant from "making an initial election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone" in any case in which the police initiate questioning. *Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988) (emphasis deleted). Because the defendant, by his assertion of the right to counsel at arraignment, has not in fact elected to deal with the police only through counsel, the defendant should be permitted afterward to waive his rights and respond to police-initiated questioning.

C. The *Jackson* Rule Imposes Limited, But Significant Costs

In federal prosecutions, the effect of the *Jackson* rule must be assessed in light of other constraints on prosecutors approaching represented defendants after the Sixth Amendment right to counsel has attached. In the main, federal authorities do not approach represented defendants, for reasons independent of *Jackson*. State rules of professional conduct generally prohibit attorneys from knowingly communicating with a represented person about the matter on which he is represented without counsel's presence, unless counsel consents to the communication or the communication is authorized by law or court order, see, *e.g.*, Model Rule of Prof'l Conduct 4.2, and those rules are made applicable to federal prosecutors, see 28 U.S.C. 530B(a) (a federal government attorney is subject to state rules of professional conduct to the same extent as any other similarly situated attorney). Although some jurisdictions deem communications permitted by the Constitution to be authorized by law within the meaning of the professional conduct rule, see, *e.g.*, Utah Rule Prof'l Conduct 4.2(a) and (b), in other jurisdictions the rule would require prosecutors to refrain from initiating communication with represented defendants notwithstanding the *Jackson* rule. And although federal law enforcement agents generally are not constrained by the ethical rules that apply to prosecutors, law enforcement interests are not well-served when law enforcement agents have an incentive to communicate with represented defendants without direction from prosecutors. Accordingly, even if this Court were to overrule *Jackson*, that decision likely would not significantly alter the manner in which federal law enforcement agents investigate indicted defendants. Nor has the *Jackson* rule resulted in the suppression of significant numbers of statements in federal prosecutions in the past.

Nevertheless, *Jackson* can potentially and inappropriately result in the loss of statements in federal prosecutions. This occurs, for example, federal agents misjudge whether a defendant has initiated dialogue with the officers and they commence interrogation in the belief that the interchange is permissible under *Jackson*. The rule in *Jackson* may also be inadvertently implicated when federal agents approach represented defendants to investigate other crimes and obtain statements on the charged offense. The conduct of state law enforcement agents could also result in the loss of evidence in federal prosecutions if state officials obtain evidence in violation of *Jackson*, federal agents seek to use that evidence in a federal prosecution, and the state and federal offenses are treated as the "same offense" for Sixth Amendment purposes. See, *e.g.*, *United States* v. *Burgest*, 519 F.3d 1307, 1310-1311 (11th Cir.) (noting circuit split on whether state and federal offenses with the same elements are the "same offense"), cert. denied, 129 S. Ct. 274 (2008). Those consequences, even if infrequent in federal cases, provide cause for concern about constitutionalizing through an exclusionary remedy a violation of professional norms.

This Court has recognized that exclusion of a defendant's own voluntary statement from his trial imposes real costs on the truth-seeking process by depriving the trier of fact of "what concededly is relevant evidence."

Colorado v. *Connelly*, 479 U.S. 157, 166 (1986). The loss of "highly probative evidence of a voluntary confession" is a "high cost to legitimate law enforcement activity." *Oregon* v. *Elstad*, 470 U.S. 298, 312 (1985). In light of its costs to the truth-seeking function, the *Jackson* rule requires a substantial justification. No such justification is present here. See pp. 5-11, *supra*.

D. *Jackson* Has Been Undermined By Subsequent Decisions And Cannot Readily Be Cabined By An Affirmative Request Rule

The *Jackson* rule is not only unfounded, but warrant reconsideration because it has been substantially undermined by several subsequent decisions of this Court and cannot otherwise be readily confined.

1. In *Patterson* v. *Illinois*, 487 U.S. 285, 298 (1988), this Court held that a defendant whose Sixth Amendment right to counsel has attached may waive that right and agree to talk with the police. In so holding, the Court made three key points that fundamentally undermine its rationales in *Jackson*. First, the Court recognized the difference between protecting an accused's prior choice to deal with the police only through counsel and "barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Id.* at 291. In the latter case, the Court explained, the suspect should be permitted to knowingly and intelligently waive the right to counsel. *Ibid.* Yet the *Jackson* rule precludes a defendant who has asserted the right to counsel in a formal courtroom context from making the initial choice whether to talk with police if the police, rather than the defendant, happen to initiate questioning.

Second, the *Patterson* Court rejected the view that it should be more difficult to waive the Sixth Amendment right to counsel during interrogation than the Fifth Amendment protections set forth in *Miranda*. The Court explained that "[t]he State's decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose that an attorney serves when the accused is questioned by authorities." 487 U.S. at 298-299. The Court therefore rejected the *Jackson* Court's assumption that "the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before," 475 U.S. at 626, 631.

Third, the *Patterson* Court noted that there is no reason to assume automatically that a defendant who elects counsel at his arraignment is unwilling to speak with the police on his own: "[A]n attorney's role at postindictment questioning is rather limited, and substantially different from the attorney's role in later phrases of criminal proceedings," because "[a]t trial, an accused needs an attorney to perform several varied functions—some of which are entirely beyond even the most intelligent layman," while "during postindictment questioning, a lawyer's role is rather unidimensional: largely limited to advising his client as to what questions to answer and which ones to decline to answer." 487 U.S. at 294 n.6. That observation directly contradicts the *Jackson* Court's "presum[ption]" that a defendant who requests counsel in courtroom proceedings necessarily has invoked his right to counsel in the very different context of police interrogation. 475 U.S. at 633.

The Court again distinguished between a defendant's choice to have counsel at formal proceedings and his choice to have counsel during police questioning in *McNeil* v. *Wisconsin*, 501 U.S. 171 (1991), when it held that a defendant's invocation of his Sixth Amendment right to counsel in judicial proceedings does not constitute invocation of the *Miranda* right to counsel. *Id.* at 178-179. The Court recognized the very different purposes of the Fifth and Sixth Amendments, and it noted that it is "not necessarily true" that a defendant who has requested counsel's assistance in formal proceedings has chosen to deal with the police only through counsel. *Id.* at 178. For that reason, the Court explained, the *Edwards* rule applies only when the defendant has made "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police.*" *Ibid.* That observation runs contrary to the Court's reasoning in *Jackson* that a defendant who has elected counsel at his arraignment should be presumed to have invoked his right to counsel in police questioning. 475 U.S. at 636.

The Court's decision in *Davis* v. *United States*, 512 U.S. 452 (1994), similarly undermines *Jackson*'s reasoning. In *Davis*, the Court held that a suspect must "unambiguously request counsel" during custodial interrogation for the prophylactic rule of *Edwards* to apply; "[i]f the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect." *Id.* at 459. Yet *Jackson* imposes the *Edwards* rule without an unambiguous invocation of the right to counsel for custodial interrogation, 475 U.S. at 636, in circumstances in which the defendant may be willing to speak to the police without counsel. See p. 10, *supra.*

The reach of the *Jackson* rule also has been limited by this Court's decision in *Texas* v. *Cobb*, 532 U.S. 162 (2001), which reiterated that the Sixth Amendment right to counsel is offense-specific. *Id.* at 165. As a result, the prophylactic *Jackson* rule applies only to questioning about the crime for which the defendant has been indicted, and law enforcement officers may initiate questioning of a represented defendant about any other crimes. See *id.* at 167-168; see also *McNeil*, 501 U.S. at 175 ("[J]ust as the right [to counsel] is offense specific, so also its *Michigan* v. *Jackson* effect of invalidating subsequent waivers in police-initiated interviews is offense specific."). *Cobb* confirms that the police may question an indicted defendant about crimes other than the charged offense and that, when questioned about other crimes, a defendant may well wish to provide a full and truthful account to police. 532 U.S. at 171-172. At the same time, *Cobb* reaffirms that the Fifth Amendment plays a substantial role "in protecting a defendant's right to consult with counsel before talking to police." *Id.* at 171 n.2. In light of *Cobb*, there is both little basis and little need for the prophylactic rule announced in *Jackson*.

2. The difficulty in identifying a coherent limiting principle in cases like this one, in which the defendant did not even request counsel, provides a final reason to revisit that decision. Several of this Court's precedents may be read to suggest that *Jackson* applies only when a defendant affirmatively requests counsel. See, *e.g.*, *McNeil*, 501 U.S. at 175; *Harvey*, 494 U.S. at 350; *Patterson*, 487 U.S. at 291; *Jackson*, 475 U.S. at 633 & n.7, 634. Yet a rule that distinguishes between those defendants who speak up in connection with the routine ap-

pointment of counsel at an arraignment and those who do not is difficult to square with the rationale of *Jackson* and the practical realities of arraignment proceedings. A defendant who silently accepts counsel at arraignment neither more nor less signals a desire not to speak with the police than one who requests counsel at arraignment; and a defendant who is automatically appointed counsel would rarely have occasion to speak up in order to invoke *Jackson*. It therefore would be appropriate to overrule *Jackson* rather than take the intermediate step of lessening its impact by limiting it to cases in which the defendant affirmatively has requested counsel.

CONCLUSION

Michigan v. *Jackson*, 475 U.S. 625 (1986), should be overruled.

Respectfully submitted.

ELENA KAGAN
Solicitor General

RITA M. GLAVIN
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

NICOLE A. SAHARSKY
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

APRIL 2009

AMICUS
CURIAE
BRIEF

125 (21)

No. 07-1529

Supreme Court, U.S.
FILED
APR 14 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JESSE JAY MONTEJO,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

SUPPLEMENTAL BRIEF OF *AMICI CURIAE* THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION, AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

JO-ANN WALLACE
NATIONAL LEGAL AID &
DEFENDER ASSOCIATION
1140 Connecticut Avenue, NW
Suite 900
Washington, DC 20036
(202) 452-0620

DAVID L. MCCOLGIN
Amicus Representative
NATIONAL ASSOCIATION OF
FEDERAL DEFENDERS
601 Walnut Street
Suite 540-W
Philadelphia, PA 19106
(215) 928-1100

SANDRA K. LEVICK
Counsel of Record
CATHARINE F. EASTERLY
RASHIDA J. OGLETREE
NINA W. CHERNOFF
PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF
COLUMBIA
633 Indiana Avenue, NW
Washington, DC 20004
(202) 628-1200

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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IN THE

Supreme Court of the United States

No. 07-1529

JESSE JAY MONTEJO,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

SUPPLEMENTAL BRIEF OF *AMICI CURIAE* THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION, AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE* [1]

The Public Defender Service for the District of Columbia provides and promotes quality legal representation to indigent people facing a loss of liberty in the District of Columbia. The National Legal Aid and Defender Association, the nation's oldest and largest nonprofit association of equal justice professionals, includes in its membership the majority of the nation's public defender offices, coordinated assigned counsel systems, and legal services agencies. The National Association of Federal Defenders is a nationwide, nonprofit organization whose membership includes federal public and community defenders authorized under the Criminal Justice Act, 18 U.S.C. § 3006A, and whose mission is to enhance the representation provided under the Act and the Sixth Amendment.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received timely notice of *amici's* intention to file this brief. No counsel for any party authored any part of this brief, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

In *Michigan v. Jackson,* 475 U.S. 625, 636 (1986), the Court held that the state violates the Sixth Amendment when it initiates an interview after a defendant requests appointment of counsel after his right to counsel has attached. But as the Court subsequently acknowledged in *Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988), the prohibition on state-initiated interviews post-charging also applies "[o]nce an accused has a lawyer." *Amici* presume it is the *Jackson* rule as interpreted by *Patterson* (hereinafter the "*Jackson* rule") that the Court is reconsidering. *Amici* write to explain why this rule is essential to our ability to fulfill our constitutional obligation to provide effective assistance and to ensuring the fundamental fairness of our adversarial system.

SUMMARY OF ARGUMENT

At its inception, the *Jackson* rule was criticized as layering prophylaxis (the *Edwards* rule) on prophylaxis (*Miranda* warnings) in order to protect against a specific danger, coercion, that was thought to be unlikely in the context of a post-charging interview of a represented defendant. *Jackson*, 475 U.S. at 637-

42 (Rehnquist, J., dissenting). But this criticism was as unfair then as it is now. The rule articulated in *Jackson* has independent justification in the Sixth Amendment that is not merely prophylactic and that has nothing to do with coercive interrogation techniques.

The *Jackson* rule precludes the state from initiating an interview with a represented defendant before his attorney has been able to meaningfully communicate with him, investigate his case, obtain discovery, and assess the legal issues presented – all actions that an attorney must take before she can reasonably counsel her client about the advisability of communicating with the state either to persuade the state of his innocence or to negotiate a disposition of the charges. The *Jackson* rule thus ensures that a defense lawyer is able to fulfill her constitutional obligation to provide effective assistance to her client and that her appointment is not a meaningless formalism.

Indeed, given what is involved in making a counseled decision to speak to state agents post-charging, the Court should acknowledge that an invitation by police or prosecutors to a represented defendant to participate in a post-charging interview is a trial-like confrontation that is itself a critical stage in a prosecution warranting Sixth Amendment protection. This conclusion is further supported by the fact that all fifty states and the District of Columbia have ethical rules that, with the aim of promoting fairness in our adversarial system, prohibit prosecutors and their agents from contacting a represented defendant post-charging.

ARGUMENT

I. THE *JACKSON* RULE ENSURES THAT COURT-APPOINTED COUNSEL ARE ABLE TO FULFILL OUR SIXTH AMENDMENT OBLIGATION TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL TO OUR CLIENTS.

The *Jackson* rule prevents police and prosecutors from initiating contact with represented defendants at any time post-charging – from the beginning of the prosecution up to and at trial. But given ethical rules that prohibit attorneys and their agents from contacting represented parties and that apply equally in civil and criminal cases, *see* Point III *infra*, the true force of the *Jackson* rule is felt at the earliest stages of a criminal case, just after counsel is appointed or retained. By requiring police and prosecutors to use counsel as the medium to communicate with the defendant, the *Jackson* rule ensures that counsel will have the time needed to adequately advise her client about speaking to state agents post-charging, and thus ensures that her appointment or retention has force and meaning. *See Spano v. New York*, 360 U.S. 315, 326 (1959) ("'[T]he denial of opportunity for appointed counsel . . . to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham . . . .'") (Douglas, J., concurring) (citation omitted).

Ours is an adversarial system of criminal justice. On one side is the prosecutor, who, within the bounds of doing justice, "may prosecute with earnestness and vigor" and "use every legitimate means to bring about a just" conviction. *Berger v. United States*, 295 U.S. 78, 88 (1935). On the other side is the defendant, who, once charged, is guaranteed the assistance of counsel to compensate for his lack of "'skill in the science of law'" and "to minimize imbalance in the adversary system" with "a professional prosecuting official." *United States v. Ash*, 413 U.S. 300, 307, 309 (1973) (citation omitted); *see also* U.S. Const. Amend. 6. Defense counsel is charged with zealously advocating for his client within the bounds of the law and is deemed "to best serve[] the public . . . by advancing 'the undivided interests of his client.'" *Polk County v. Dodson,* 454 U.S. 312, 318-19 (1984) (citation omitted); *see also* ABA Standards for Criminal Justice, Defense Function ["ABA Stnd."] 4-1.2 Commentary p. 126 (3d ed. 1993) ("[O]ur adversary process of justice requires that counsel be guided constantly by the obligation to pursue the client's interests."). "The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness." *Polk County,* 454 U.S. at 318. Within this construct, both sides generally prepare their respective cases outside of the view of the other and only disclose information when required by law or when it promotes some strategic advantage.

After the state has filed charges against a defendant, the decision to speak to police or prosecutors is a critical one. At this point the state has determined that the defendant has committed a crime, and police or prosecutors will not be "trying to solve a crime or even absolve a suspect . . . . [R]ather [they will be] concerned primarily with securing a statement from defendant on which they . . . [can] convict" him. *Spano*, 360 U.S. at 324-25. Speaking to police or prosecutors carries great risks, but there are also significant potential benefits. This is why defense counsel, consistent with our role as advocate, routinely advise our clients to participate in interviews with or make proffers to the state and negotiate the terms of such interactions.

But before an attorney can reasonably assess the advisability of speaking to police or prosecutors post-charging, she must have adequate knowledge of the facts and the law of the case. As part of her constitutional duty to "function as assistant to the defendant," counsel must be able to advise her client intelligently and "advocate the defendant's cause." *Strickland v. Washington*, 466 U.S. 668, 688, (1984). "Prevailing norms of practice as reflected in . . . ABA Standards for Criminal Justice . . . ('The Defense Function'), are guides to determining what" counsel "reasonabl[y]" must do to fulfill this obligation pre-trial. *Id.* at 688; *see also Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (quoting *Strickland*).

To begin with, counsel must quickly establish a relationship with her client such that she can act as an effective advocate. *See* ABA Stnd. 4-3.1. She must meet with her client soon after appointment, and without interference from police, prosecutors or other state agents. *Id.* 4-3.1(b) (noting the "essential" need for "privacy" to facilitate "confidential communications"). At this meeting, counsel may begin to develop possible defenses and investigative leads; to assess the client's ability to participate in his defense; and to learn of any constitutional violations that may have occurred. She must also attempt to advise her client to forestall the loss of important rights, including his right against self-incrimination. *See id.* 4-3.6 Commentary p. 171 ("One of the lawyer's most significant tasks is to inform the client of the nature, extent and importance of constitutional and legal rights and to take the procedural steps necessary to protect them. This includes advice concerning the privilege against self-incrimination and the appropriate responses to be made to a[n] . . . interrogation . . . ."); *see also* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 69 (2003) (noting the particular importance in death penalty cases for counsel "to try to prevent uncounseled confessions or admissions").

In addition to communicating with her client, counsel must "conduct a prompt investigation of the circumstances of the case and explore all avenues leading to the facts relevant to the merits of the case and penalty in the event of conviction." ABA Stnd. 4-4.1(a); *see also Rompilla,* 545 U.S. 374 (discussing counsel's duty to investigate). The importance of fact investigation cannot be overstated. It "form[s] the basis of effective representation." ABA Stnd. 4-4.1 Commentary p. 181. It is essential for competent representation at trial, but it also "may avert the need for courtroom confrontation," *id.* at 181-82, and is indispensible "to conduct plea negotiations effectively." *Id.* at 183.

Lastly, counsel must determine whether "the prosecution can establish guilt *in law*, not in some moral sense." *Id.* 4-4.1 Commentary p. 182. Accordingly, "[c]ounsel must . . . promptly undertake whatever legal research is necessary to assure vindication of . . . her client's rights." *Id.* 4-3.6 Commentary p. 172; *see also id.* 4-5.1 Commentary p. 197-98 (emphasizing an attorney's duty to be informed given the client's likely ignorance of criminal law and procedure).

Only "after [counsel has] inform[ed] . . . herself fully on the facts and the law" should counsel "advise the accused . . . concerning all aspects of the case, including a candid estimate of the probable outcome." *Id.* 4-5.1(a); *see also id.* 4-6.1(b) (requiring "appropriate investigation and study of the case . . . including an analysis of controlling law and the evidence likely to be introduced at trial" before counsel recommends a guilty plea).

Part of this conversation should include whether it would be possible or advisable to talk to police or prosecutors either to persuade them of the defendant's innocence or lesser involvement in the crime; or to assist the prosecution of others; or to admit guilt and negotiate a disposition of the case. *Id.* 4-6.1 Commentary p. 205 (an attorney has both the "obligation to explore the possibility of disposition by plea when . . . [she] concludes that conviction of some kind is likely" and a "duty to try to seek dismissal of the charges if . . . [she] concludes that the accused is not guilty or ought not be convicted."). If counsel and her client determine speaking to police or prosecutors is in the client's best interest, it is counsel's obligation to negotiate the terms of any information exchange, *e.g.*, whether the prosecutor would give the client immunity for other revealed crimes, or, in exchange for information, pursue lesser offenses or punishment. *See id.* 4-1.2(b) (counsel's function is "to serve as the accused's counselor and advocate").

Thus, although "an attorney's role at postindictment questioning" may appear "rather . . . unidimensional," limited to advising her client to refrain from making any statements or "advising h[er] client as to what questions [not] to answer," *Patterson*, 487 U.S. at 294 n.6; *see also id.* at 300 (describing counsel's role as "relatively simple and limited"), this appearance is misleading. In fact much must be done by counsel, in consultation with her client, to determine whether and on what terms to submit to an interview with the state post-charging. Counsel must have full knowledge of the facts and law of the case and must have adequately prepared to leverage that knowledge with the prosecution. In other words, counsel must "bring to bear" the same "skill and knowledge" needed to "render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688; *cf. Hill v. Lockhart*, 474 U.S. 52 (1985) (right to effective assistance applies to counsel's advice to plead guilty).

All of this work takes time, which is precisely what the *Jackson* rule gives defense counsel. Under *Jackson*, the state cannot initiate contact with a represented defendant post-charging. Thus the state agents who seek a defendant's conviction cannot press him to precipitously speak to them and thereby interfere with counsel's efforts to determine the best course of action for her client. Accordingly, the *Jackson* rule safeguards the Sixth Amendment right to effective assistance of counsel itself. *Maine v. Moulton*, 474 U.S. 159, 176 (1985) (The Sixth Amendment "guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right.").

II. A POST-CHARGING OVERTURE BY POLICE OR PROSECUTORS TO A REPRESENTED DEFENDANT TO PARTICIPATE IN AN INTERVIEW IS ITSELF A CRITICAL STAGE OF OUR ADVERSARIAL PROCESS THAT WARRANTS SIXTH AMENDMENT PROTECTION.

To ensure the functioning of our adversarial system, the Sixth Amendment right to counsel is guaranteed at all "critical stages" of a criminal prosecution, not simply at trial. *Ash*, 413 U.S. at 310-311; *id.* at 312 (the right to counsel extends "to trial-like confrontations" where counsel is needed to "act as a spokesman for, or advisor to, the accused"); *see also*

United States v. Wade, 388 U.S. 218, 227 (1967) ("The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversar[ial]" sytem). A critical stage may be "formal or informal, in court or out." *Wade*, 388 U.S. at 226. What is dispositive is whether counsel may be of meaningful assistance – or as explained last term in *Rothgery v. Gillespie County, Tex.*, 128 S. Ct. 2578, 2591 (2008), "what makes a stage critical is what shows the need for counsel's presence." *See also Patterson,* 487 U.S. at 298 ("[W]e have defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel . . . .").

The complexity of the decision whether a defendant should speak to police or prosecutors post-charging, *see* Point I *supra*, demonstrates that any overture to a represented defendant is itself a "trial-like confrontation" and a critical stage of a prosecution where counsel's assistance is needed.

Such a conclusion is compelled by this Court's decision in *Estelle v. Smith*, 451 U.S. 454 (1981). In *Estelle*, the prosecution engaged an expert to conduct a psychiatric evaluation of a represented capital defendant without notifying his counsel that it intended to use this evaluation at sentencing to establish future dangerousness. The Court held the state violated the Sixth Amendment because the defendant had a "right to the assistance of counsel *before* submitting to the pretrial psychiatric interview." 451 U.S. at 469 (emphasis added). Specifically, the Court observed the decision to participate in the interview was "'difficult . . . even for an attorney' because it requires 'a knowledge of what other evidence is available, . . . [and] of possible alternative strategies at the sentencing hearing.'" *Id.* at 471 (citation omitted). Accordingly, the Court held the defendant was entitled to "the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." *Id.*

"It follows logically from . . . [the Court's] precedents that a [represented] defendant should not be forced to resolve" a similarly if not more "important issue" of whether to submit to a post-charging interview with police or the prosecutors "without 'the guiding hand of counsel.'" *Id.* (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

Recognizing that an overture by police or prosecutors to a represented defendant to participate in an interview is a critical stage at which a defendant is entitled to counsel's assistance in no way impinges on a defendant's "free choice" to speak. *Cf. Texas v. Cobb,* 532 U.S. 162, 175 (2001) (Kennedy, J., concurring) (expressing concern about "a Sixth Amendment rule" that would "invalidate a confession given by . . . free choice" in a case where counsel repeatedly gave police permission to interview his client).

As discussed above, counsel may well advise that accepting an invitation for an interview *is* in the client's best interest. But even where counsel advises his client against speaking to police or prosecutors post-charging, her advice is only that – advice. *Ash,* 413 U.S. at 312 (counsel is "an advisor to the accused"). If the defendant wants to speak to police or prosecutors, he can always reject counsel's "guiding hand," *Powell*, 287 U.S. at 69, and initiate contact, just as he can always reject advice regarding other decisions that are ultimately his to make, *e.g.,* the decision to testify at trial or to waive trial and plead guilty. *See* ABA Stnd. 4-5.2 Commentary p. 201 ("because of the[ir] fundamental nature . . . , so crucial to the accused's fate, the accused must make the[se] decisions himself"). The *Jackson* rule simply ensures a defendant is given the opportunity to receive counsel's advice; in other words, it simply ensures a defendant's free choice is knowing and intelligent.

By contrast, allowing the government to circumvent a defendant's counsel and approach him directly with a request for an interview protects nothing more than his "right" to make an uninformed and perhaps ill-advised decision. This is precisely why a defendant is afforded a right to counsel – in order to ensure that he is not "misled by his lack of familiarity with the law or overpowered by his professional adversary." *Ash,* 413 U.S. at 317. Moreover, it is paradoxical to argue that the only way to preserve a defendant's free choice is to circumvent his counselor-advocate and afford police and prosecutors – parties directly adverse to him – unmonitored access. If *that* is the only way to ensure a defendant's free choice, then the very foundation of the Sixth Amendment right to counsel and our adversarial system is subject to question.

III. THE LONG-STANDING ETHICAL RULE PROHIBITING ATTORNEYS FROM CONTACTING REPRESENTED PARTIES IN *BOTH* CIVIL AND CRIMINAL CASES IS FURTHER EVIDENCE THAT THE *JACKSON* RULE ENSURES FUNDAMENTAL FAIRNESS IN OUR ADVERSARIAL SYSTEM.

At oral argument, there appeared to be a misconception that the ethical rule prohibiting attorneys from contacting represented persons applies only in civil cases. *See* Oral Argument Transcript, *Montejo v. Louisiana*, 2009 WL 76296 at *10, 32 (Jan. 13, 2009). In fact, ABA Model Rule of Professional Conduct ["ABA Rule"] 4.2 (Feb. 2009) and its state counterparts apply equally in the civil and criminal context and reflect a long-standing consensus about the unfairness of circumventing a represented person's counsel, particularly in a criminal case post-charging. Indeed, this universally accepted ethical rule is further evidence that the *Jackson* rule operates to ensure fundamental fairness in our adversarial justice system and is thus compelled by the Sixth Amendment.

Admonitions in England and the United States against contact with represented parties date back at least to the early nineteenth century. For example, in *In re Oliver*, 111 Eng. Rep. 239, 240 (K.B. 1835), the court, in evaluating the legitimacy of a document signed by a woman in the absence of counsel, disregarded conflicting arguments made about her competence, sophistication in matters of business, and whether or not she had indicated need for her solicitor's assistance. Instead, the chief judge held that "[t]his rule must be made absolute. When it appeared that Mrs. Oliver had an attorney . . . it was improper to obtain her signature, with no attorney present on her part. If this were permitted, a very impure, and often fraudulent, practice would prevail." *Id.* A year later, David Hoffman, "one of the foremost legal educators of the early American Bar," James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 2008 Prof. Law. 235, 261, proclaimed, "I will never enter into any conversation with my opponent's client, relative to his claim or defence, except with the consent, and in the presence of his counsel." ABA Formal Op. 95-396 (1995) *2 (citation omitted). The ABA relied heavily on Professor Hoffman's treatise when it drafted its first set of ethical rules for lawyers, ABA Canons of Professional Ethics (1908), which included a no-contact rule, *id.* Cannon 9, the progenitor of modern ABA Rule 4.2. Altman, *supra*, at 239-240; ABA Formal Op. 124 (1934).

ABA Rule 4.2 prohibits a lawyer and his agents from "communicat[ing] about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." ABA Rule 4.2; *id.* Comment 4. The rule's comments specifically provide that "[w]hen communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused." *Id.* Comment 5; *see also* ABA Formal Op. 95-396 at *3 ("[I]t is clear that Rule 4.2 applies to the conduct of lawyers in criminal as well as civil matters. . . ."). Indeed, the ABA has acknowledged that "there are perhaps stronger policy considerations" for the application of the no-contact rule in criminal cases. ABA Formal Op. 1373 (1976). The ABA has accordingly incorporated into its ethical rules for prosecutors a no-contact provision specifically prohibiting them from interacting with defendants at initial appearances absent a waiver of counsel. *See* ABA Criminal Justice Standards, Prosecution Function, 3-3.10 (a); *see also id.* Commentary p.79-80 (noting the "consisten[cy]" of this rule "with the spirit of both ABA model [Rule 4.2 and its predecessor].").

All fifty states and the District of Columbia include in their rules of professional responsibility some form of "no contact" rule, which at the very least prohibits prosecutors and their agents from contacting represented criminal defendants post-charging, and the overwhelming majority have simply adopted the text of ABA Rule 4.2. *See* Appendix of State Rules of Professional Responsibility. Almost all federal district courts have rules directing attorneys to abide by local ethical rules or the ABA rules. *See* Appendix of Federal District Court Rules Regarding Rules of Professional Responsibility.[2]

The purpose of this "no-contact" rule has nothing to do with concerns about coerced statements, and everything to do with ensuring fairness in our adversarial system of civil and criminal justice and, as a means to that end, preserving the attorney-client relationship. Its "fundamental premise" is that "[t]he legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel." ABA Model Code of Professional Responsibility EC 7-18 (1983)[3]; *see also* ABA Formal Op. 95-396 at *3 (the purpose of Rule 4.2 is to "protect represented persons against overreaching by adverse counsel, safeguard the attorney-client relationship from interference, and reduce the likelihood that clients will disclose . . . information harmful to their interests").

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[2] In the 1980s, the Department of Justice ["DOJ"] challenged its obligation to abide by state no-contact rules pre-charging, while accepting no-contact rules post-charging. *See* Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations, Office of Legal Counsel, 1980 WL 20955 *10 (Apr. 18, 1980) (distinguishing the two scenarios). DOJ ultimately lost the pre-charging no-contact battle with the passage of the McDade-Murtha Citizens Protection Act, 28 U.S.C. § 530A.

[3] Ethical Consideration 7-18 preceded ABA Rule 4.2 and "set[] out the central proposition on which all of the anti-contact rules have rested." ABA Formal Op. 95-396 *3.

Indigent defendants are not denied the benefit of this ethical rule simply because counsel was appointed for them by the Court. Rather, to conform with "the letter and the spirit of the canons of ethics," "once a criminal defendant has either retained an attorney or had an attorney appointed for him by the court," a prosecutor must notify the defendant's attorney of any interview and "give[] [the attorney] a reasonable opportunity to be present." *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir. 1973).

Prosecutors and their agents have long been bound by ethical rules prohibiting contact with represented parties with no adverse effect. *Amici* do not argue that the Sixth Amendment right to counsel is coextensive with these no-contact rules, which "serve separate, albeit congruent purposes."[4] *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988). But, consistent with these rules, the Sixth Amendment must at least guarantee represented defendants the core protection against state-initiated interviews post-charging, which has long been considered essential to the functioning and fairness of our adversarial system.

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[4] These rules vary in scope, *see* Appendix, and apply in civil proceedings. Moreover, some state rules preclude a lawyer from communicating with a represented defendant pre-charging or even when the defendant initiates contact. The Sixth Amendment does not extend so far. *See Rothgery*, 128 S. Ct. at 2592; *cf. Brewer v. Williams*, 430 U.S. 387, 405-06 (1977); *see also* p. 11-12 *supra*.

CONCLUSION

Even as police were pressing Mr. Montejo for more information to use to convict him, his court-appointed counsel was trying to meet him for the first time so they could begin work on his case. *See* Petitioner's Brief at 9-10. Without the *Jackson* rule, it will become commonplace for police to race to interview a represented defendant before he can obtain meaningful advice from counsel about whether and on what terms he should speak to state agents. Whether there is, as here, a gap between appointment and a defendant's first meeting with counsel because public defenders' offices cannot afford to send attorneys to staff initial appearances, or whether a defendant has had a "hurried interchange," *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990), with counsel in a crowded courthouse lockup, a defendant's Sixth Amendment right to a counselor and advocate post-charging and pre-trial will be significantly diminished. Accordingly, *amici* respectfully urge the Court to reaffirm *Michigan v. Jackson*.

Respectfully submitted,

JO-ANN WALLACE
NATIONAL LEGAL AID &
DEFENDER ASSOCIATION
1140 Connecticut Avenue, NW
Suite 900
Washington, DC 20036
(202) 452-0620

DAVID L. MCCOLGIN
Amicus Representative
NATIONAL ASSOCIATION OF
FEDERAL DEFENDERS
601 Walnut Street
Suite 540-W
Philadelphia, PA 19106
(215) 928-1100

SANDRA K. LEVICK
Counsel of Record
CATHARINE F. EASTERLY
RASHIDA J. OGLETREE
NINA W. CHERNOFF
PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF
COLUMBIA
633 Indiana Avenue, NW
Washington, DC 20004
(202) 628-1200

Counsel for Amici Curiae

APPENDIX

APPENDIX A

STATE RULES OF PROFESSIONAL RESPONSIBILITY

Alabama

ALA. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

Alaska

ALASKA R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party or person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

Arizona

17A ARIZ. REV. STAT. SUP. CT. R. 42, R. OF PROF. CONDUCT E.R. 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

Arkansas

ARK. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law.").

California

CAL. R. OF PROF. CONDUCT 2-100(A) ("While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.").

Colorado

COLO. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

Connecticut

CONN. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

Delaware

DEL. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

District of Columbia

D.C. R. OF PROF. CONDUCT 4.2(a) ("During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a person known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law or a court order to do so.").

Florida

FLA. STAT. ANN. BAR R. 4-4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney.").

Georgia

GA. STATE BAR R. AND REG., R. 4-102, R. OF PROF. CONDUCT 4.2 ("(a) A lawyer who is representing a client in a matter shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by constitutional law or statute. (b) Attorneys for the State and Federal Government shall be subject to this rule in the same manner as other attorneys in this State. The maximum penalty for a violation of this rule is disbarment.").

Hawaii

HAW. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

Idaho

IDAHO R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

Illinois

ILL. Sup. Ct. R. OF PROF. CONDUCT 4.2 ("During the course of representing a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party or as may otherwise be authorized by law.").

Indiana

IND. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order.").

Iowa

IOWA R. OF PROF. CONDUCT 32.D.R. 7-104(a) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.")

Kansas

KAN. SUP. CT. R. 226, R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

Kentucky

KY. SUP. CT. R. 3.130(4.2) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

Louisiana

LA. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject representation with: (a) a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized so by law or a court order.

Maine

ME. CODE PROF. RESPONSIBILITY, R. 3.6(f) ("During the course of representation of a client, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.").

Maryland

MD. R., R. 16-812, MD. LAWYERS' R. OF PROF. CONDUCT 4.2 ("[I]n representing a client, a lawyer shall not communicate about the subject of the representation with a person who the lawyer knows is represented in the matter by another lawyer unless the lawyer has the consent of the other lawyer or is authorized by law or court order to do so.").

Massachusetts

MASS. R. SUP. JUD. CT. R. 3:07, R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

Michigan

MICH. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

Minnesota

MINN. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

Mississippi

MISS. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

Missouri

MO. SUP. CT. R. 4-4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

Montana

MONT. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

Nebraska

NEB. CT. R. OF PROF. CONDUCT § 3-504.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

Nevada

NEV. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

New Hampshire

N.H. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

New Jersey

N.J. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter . . . unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel.").

New Mexico

N.M. R. OF PROF. CONDUCT 16-402 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

North Carolina

N.C. R. OF PROF. CONDUCT 4.2(a) ("During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. It is not a violation of this rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good-faith attempt to resolve the controversy.").

North Dakota

N.D. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

Ohio

OHIO R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer *knows* to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

Oklahoma

OKLA. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

Oregon

OR. R. OF PROF. CONDUCT 4.2 ("In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless: (a) the lawyer has the prior consent of a lawyer representing such other person; (b) the lawyer is authorized by law or by court order to do so; or (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.").

Pennsylvania

PA. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

Rhode Island

R.I. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

South Carolina

S.C. APP. CT. R. 407, R. 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

South Dakota

S.D. CODIFIED LAWS 16-18 APP., R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

Tennessee

TENN. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

Texas

TEX. DISC. R. OF PROF. CONDUCT, R. 4.02(a) ("In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

Utah

UTAH R. OF PROF. CONDUCT 4.2(a) ("General rule. In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client if authorized to do so by any law, rule, or court order, in which event the communication shall be strictly restricted to that allowed by the law, rule or court order, or as authorized by paragraphs (b), (c), (d) or (e) of this rule.").

Id. at 4.2(c) ("Rule Relating to Government Lawyers Engaged in Civil or Criminal Law Enforcement. A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer's direction in the matter, may communicate with a person known to be represented by a lawyer if: (c)(1) the communication is in the course of, and limited to, an investigation of a different matter unrelated to the representation or any ongoing, unlawful conduct; or (c)(2) the communication is made to protect against an imminent risk of death or serious bodily harm or substantial property damage that the government lawyer reasonably believes may occur and the communication is limited to those matters necessary to protect against the imminent risk; or (c)(3) the communication is made at the time of the arrest of the represented person and after that person is advised of the right to remain silent and the right to counsel and voluntarily and knowingly waives these rights; or (c)(4) the communication is initiated by the represented person, directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel, including the right to have substitute counsel, for that communication.").

Id. at 4.2(e) ("Limitations on Communications. When communicating with a represented person pursuant to this rule, no lawyer may (e)(1) inquire about privileged communications between the person and counsel or about information regarding litigation strategy or legal arguments of counsel or seek to induce the person to forgo representation or disregard the advice of the person's counsel; or (e)(2) engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement or other disposition of actual or potential criminal charges or civil enforcement claims or sentences or penalties with respect to the matter in which the person is represented by counsel unless such negotiations are permitted by law, rule or court order.").

Vermont

VT. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

Virginia

VA. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

Washington

WASH. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

West Virginia

W. VA. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

Wisconsin

WIS. SUP. CT. R. CH. 20, S.C.R. 20:4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

Wyoming

WYO. R. OF PROF. CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person or entity the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

APPENDIX B

FEDERAL DISTRICT COURT RULES REGARDING RULES OF PROFESSIONAL RESPONSIBILITY

District Courts Adopting State Ethical Rules and/or ABA Model Rules

Alabama

U.S. DIST. CT. R. N.D. ALA., L. R. 83.1(f) ("Each attorney who is admitted to the bar of this court or who appears in this court pursuant to subsection (b) or (c) of this Rule is required to be familiar with, and shall be governed by, the Local Rules of this court and, to the extent not inconsistent with the preceding, the Alabama Rules of Professional Conduct adopted by the Alabama Supreme Court and, to the extent not inconsistent with the preceding, the American Bar Association Model Rules of Professional Conduct, except Rule 3.8(f) thereof.").

U.S. DIST. CT. R. M.D. ALA., L. R. 83.1(f) ("Attorneys admitted to practice before this Court shall adhere to this Court's Local Rules, the Alabama Rules of Professional Conduct, the Alabama Standards for Imposing Lawyer Discipline, and, to the extent not inconsistent with the preceding, the American Bar Association Model Rules of Professional Conduct.").

U.S. DIST. CT. R. S.D. ALA., L. R. 83.5(f) ("Any attorney who is admitted to the Bar of this Court or who appears in this Court pursuant to subsection (b), (c), (d) or (e) of this rule shall agree to read and abide by the Local Rules of this Court, the ethical limitations and requirements governing the behavior of members of the Alabama State Bar, and, to the extent not inconsistent with the preceding, the American Bar Association Model Rules of Professional Conduct.").

Alaska

D. ALASKA L. R. 83.1(i)(1) ("Every member of the bar of this court and any attorney admitted to practice or appear in this court must . . . be familiar with and comply with the Standards of Professional Conduct required of the members of the State Bar of Alaska and contained in the Alaska Rules of Professional Conduct and decisions of any court applicable thereto, except insofar as those rules and decisions are otherwise inconsistent with federal law . . . .").

Arizona

U.S. DIST. CT. R. D. ARIZ., L. R. 83.2(e) ("The 'Rules of Professional Conduct,' in the Rules of the Supreme Court of the State of Arizona, shall apply to attorneys admitted or otherwise authorized to practice before the United States District Court for the District of Arizona.").

Arkansas

UNIF. U.S. DIST. CT. R. D. ARK., DISCIPLINARY ENFORCEMENT R. 4B ("The Code of Professional Responsibility or Rules of Professional Conduct adopted by this Court is the Code of Professional Responsibility or Rules of Professional Conduct adopted by the highest court of the state in which this Court sits, as amended from time to time by that state court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives of bar associations within the state.").

California

U.S. DIST. CT. R. E.D. CAL., GEN. L. R. 83-180(e) ("Every member of the Bar of this Court, and any attorney permitted to practice in this Court under subsection (b), shall become familiar with and comply with the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California and decisions of any Court applicable thereto, which are hereby adopted as standards of professional conduct in this Court.").

U.S. DIST. CT. R. N.D. CAL., CIV. L. R.11-4(a) ("Every member of the bar of this Court and any attorney permitted to practice in this Court under Civil L. R. 11 must . . . [b]e familiar and comply with the standards of professional conduct required of members of the State Bar of California . . . .").

U.S. DIST. CT. R. C.D. CAL., CIV. L. R. 83-3.1.2 ("[E]ach attorney shall be familiar with and comply with the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and the decisions of any court applicable thereto.").

U.S. DIST. CT. R. S.D. CAL., CIV.L. R. 83.4(b) ("Every member of the bar of this court and any attorney permitted to practice in this court shall be familiar with and comply with the standards of professional conduct required of members of the State Bar of California, and decisions of any court applicable thereto, which are hereby adopted as standards of professional conduct of this court.").

Colorado

U.S. DIST. CT. R. D. COLO., D. COLO.LCRR 57.6 ("Except as otherwise provided by Administrative Order, the Colorado Rules of Professional Conduct adopted by the Colorado Supreme Court . . . are adopted as standards of professional responsibility applicable in this court."); *see also* U.S. DIST. CT. R. D. COLO., App. O ("D. COLO. LCIVR 83.4 and D. COLO. LCRR 57.6 set forth the standards of professional responsibility applicable in this court. Those standards incorporate the Colorado Rules of Professional Conduct, as adopted by the Colorado Supreme Court, en banc . . . .").

Connecticut

U.S. DIST. CT. R. D. CONN., L.CIV.R. 83.2(a)(1) ("Other than the specific Rules enumerated in Rule 83.2(a)(2) of these Local Rules, this Court recognizes the authority of the 'Rules of Professional Conduct,' as approved by the Judges of the Connecticut Superior Court as expressing the standards of professional conduct expected of lawyers practicing in the District of Connecticut."); U.S. DIST. CT. R. D. CONN., L.CR.R. 1(c) ("The following Local Civil Rules shall apply in criminal proceedings . . . 83.2 (Discipline of Attorneys) . . . .").

Delaware

D. DEL. L. R. 83.6(d) ("Subject to such modifications as may be required or permitted by federal statute, court rule, or decision, all attorneys admitted or authorized to practice before this Court, including attorneys admitted on motion or otherwise, shall be governed by the Model Rules of Professional Conduct of the American Bar Association ('Model Rules'), as amended from time to time.").

District of Columbia

U.S. DIST. CT. R. D.C., LCVR 83.15(a) ("Violations of the Rules of Professional Conduct (as adopted by the

District of Columbia Court of Appeals except as otherwise provided by specific Rule of this Court) by attorneys subject to these Rules shall be grounds for discipline . . . ."); U.S. DIST. CT. R. D.C., LCRR 57.26(a) (same).

Florida

U.S. DIST. CT. R. N.D. FLA., L. R.11.1(E)(1) ("Except where an act of Congress, federal rule of procedure, Judicial Conference Resolution, or rule of court provides otherwise, the professional conduct of all members of the bar of this district, with respect to any matter before this court, shall be governed by the Rules of Professional Conduct of the Rules Regulating The Florida Bar.").

U.S. DIST. CT. R. M.D. FLA., L. R. 2.04(d) ("The professional conduct of all members of the bar of this Court . . . shall be governed by the Model Rules of Professional Conduct of the American Bar Association as modified and adopted by the Supreme Court of Florida to govern the professional behavior of the members of The Florida Bar.").

U.S. DIST. CT. R. S.D. FLA., GEN. R.11.1(C) ("The standards of professional conduct of members of the Bar of this Court shall include the current Rules Regulating The Florida Bar. For a violation of any of these canons in connection with any matter pending before this Court, an attorney may be subjected to appropriate disciplinary action.").

Georgia

U.S. DIST. CT. R. N.D. GA., CIV. L. R. 83.1(C) ("All lawyers practicing before this court shall be governed by and shall comply with the specific rules of practice adopted by this court and, unless otherwise provided, with the Georgia Rules of Professional Conduct contained in the Rules and Regulations of the State Bar of Georgia and with the decisions of this court interpreting these rules and standards."); U.S. DIST. CT. R. N.D. GA., CRIM. L. R. LCRR 57.1(C) ("Refer to L. R. 83.1C.").

U.S. DIST. CT. R. M.D. GA., CIV. RULE 83.2.1 ("Attorneys practicing before this Court shall be governed by this Court's Local Rules, by the Rules of Professional Conduct adopted by the highest court of the state in which this Court sits, as amended from time to time by that state court, and, to the extent not inconsistent with the preceding, the American Bar Association Model Rules of Professional Conduct, except as otherwise provided by specific Rule of this Court.").

U.S. DIST. CT. R. S.D. GA., L. R. 83.5(d) ("The standards of professional conduct of attorneys appearing in a case or proceeding, or representing a party in interest in such a case or proceeding, are governed by the Georgia Bar Rules of Professional Conduct and the American Bar Association's Model Rules of Professional Conduct.").

Hawaii

D. HAW. GEN. R. & CIV. R., L. R. 83.3 ("Every member of the bar of this court and any attorney permitted to practice in this court pursuant to L. R. 83.1(d) shall be governed by and shall observe the standards of professional and ethical conduct required of members of the Hawai'i State Bar.").

Idaho

D. IDAHO L. R. 83.5(a) ("All members of the bar of the District Court . . . for the District of Idaho . . . and all attorneys permitted to practice in this Court must familiarize themselves with and comply with the Idaho Rules of Professional Conduct of the Idaho State Bar and decisions of any court interpreting such rules. These provisions are adopted as the standards of professional conduct for this Court but must not be interpreted to be exhaustive of the standards of professional conduct.").

Illinois

N.D. ILL. R. PROF. CONDUCT, L. R. 83.54.2 (Following ABA Rule 4.2: "During the course of representing a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party or as may otherwise be authorized by law.").

C.D. ILL. L. R., GEN. & CIV. R., L. R. 83.6(D) ("The Rules of Professional Conduct adopted by this court are the Rules of Professional Conduct adopted by the Supreme Court of Illinois, as amended from time to time by that court, except as otherwise provided by specific rule of this court after consideration of comments by representatives of bar associations within the state.").

S.D. ILL. L. R. 83.4(d)(2) ("The Rules of Professional Conduct adopted by this court are the Rules of Professional Conduct adopted by the Supreme Court of Illinois as amended from time to time, except as otherwise provided by specific rule of this court.").

Indiana

N.D. IND. L. R. 83.5(f) ("The Rules of Professional Conduct, as adopted by the Indiana Supreme Court, and the Standards for Professional Conduct, as adopted by the Seventh Circuit, shall provide standards of conduct for those practicing in this court.").

S.D. IND. L. R. 83.5(g) ("The Rules of Professional Conduct, as adopted by the Indiana Supreme Court, shall provide the rules governing conduct for those practicing in this Court.").

Iowa

N.D. IOWA & S.D. IOWA L.CIV.R. 83.1(g)(1) ("The Iowa Rules of Professional Conduct, or any successor code adopted by the Iowa Supreme Court, govern all members of the bar of this court and, to the extent provided in subsection d.3 of this rule, those admitted pro hac vice.").

Kansas

D. KAN. L. R. 83.6.1(a) ("The Kansas Rules of Professional Conduct as adopted by the Supreme Court of Kansas, and as amended by that court from time to time, except as otherwise provided by a specific rule of this court, are adopted by this court as the applicable standards of professional conduct.").

Kentucky

E.D. KY. & W.D. KY. JT. L. R. CIV. PRACT. 83.3(c) ("If it appears to the Court that an attorney practicing before the Court has violated the rules of the Kentucky Supreme Court governing professional conduct or is guilty of other conduct unbecoming an officer of the Court, any judge may order an attorney to show cause--within a specified time--why the Court should not discipline the attorney."); JT. U.S. DIST. CT. R. D. KY., L.CR.R. 57.3(c) (same).

Louisiana

E.D. LA., M.D. LA., & W.D. LA. UNIF. L. R., 83.2.4E ("This court hereby adopts the Rules of Professional Conduct of the Louisiana State Bar Association, as hereafter may be amended from time to time by the Louisiana Supreme Court, except as otherwise provided by a specific rule or general order of a court."); E.D. LA., M.D. LA., & W.D. LA. UNIF. L. R., 83.2.4M (same); E.D. LA., M.D. LA., & W.D. LA. UNIF. L. R., 83.2.4W (same).

Maine

D. ME. CIV. R. 83.3(d) ("This Court adopts as its standard for professional conduct the Code of Professional Responsibility adopted by the Supreme Judicial Court of Maine, as amended from time to time by that Court.").

Maryland

D. MD. R.704 ("This Court shall apply the Rules of Professional Conduct as they have been adopted by the Maryland Court of Appeals.").

Massachusetts

D. MASS. L. R. 83.6(4)(B) ("The ethical requirements and rules concerning the practice of law mean those canons and rules adopted by the Supreme Judicial Court of Massachusetts . . . as they may be amended from time to time by said court, except as otherwise provided by specific rule of this court after consideration of comments by representatives of bar associations within the Commonwealth.").

Michigan

E.D. MICH. L. R. 83.20(j) ("An attorney admitted to the bar of this court or who practices in this court as permitted by this rule is subject to the Rules of Professional Conduct adopted by the Michigan Supreme Court . . . .").

Minnesota

D. MINN. L. R. 83.6(d)(2) ("The *Minnesota Rules of Professional Conduct* adopted by the Supreme Court of Minnesota as amended from time to time by that Court are adopted by this Court except as otherwise provided by specific rules of this Court.").

Mississippi

UNIF. L. R. N.D. MISS. & S.D. MISS., R.83.5 ("An attorney who makes an appearance in any case in the district court is bound by the provisions of the Mississippi Rules of Professional Conduct and is subject to discipline for violation thereof.").

Missouri

E.D. MO. L. R. 83-12.02 ("The Rules of Professional Conduct adopted by this Court are the Rules of Professional Conduct adopted by the Supreme Court of Missouri, as amended from time to time by that Court, except as may otherwise be provided by this Court's Rules of Disciplinary Enforcement.").

W.D. MO. L.CIV.R. 83.5(c)(2) ("The Code of Professional Responsibility adopted by this Court is the Code of Professional Responsibility adopted by the highest court of the state in which this Court sits, as amended from time to time by that state court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives of bar associations within the state.").

Montana

D. MONT. GEN. R. 83.13 ("The standards of professional conduct of attorneys practicing in this Court include the American Bar Association's Model Rules of Professional Conduct and the Montana Rules of Professional Conduct.").

Nevada

D. NEV. L. R. IA 10-7(a) ("An attorney admitted to practice pursuant to any of these rules shall adhere to the standards of conduct prescribed by the Model Rules of Professional Conduct as adopted and amended from time to time by the Supreme Court of Nevada, except as such may be modified by this Court.").

New Hampshire

N.H. L.CIV.R. 83.5 DR-1 ("The Standards for Professional Conduct adopted by this court are the Rules of Professional Conduct as adopted by the New Hampshire Supreme Court, as the same may from time to time be amended by that court, and any standards of conduct set forth in these rules."); N.H. L.CRIM.R. 1.1(d) ("The following civil/general local rules shall apply in criminal actions: Rule[] . . . 83.5 . . . .").

New Jersey

D. N.J. L.CIV.R. 103.1(a) ("The Rules of Professional Conduct of the American Bar Association as revised by the New Jersey Supreme Court shall govern the conduct of the members of the bar admitted to practice in this Court, subject to such modifications as may be required or permitted by Federal statute, regulation, court rule or decision of law."); D. N.J. L.CRIM.R. 1.1 ("The following Local Civil Rules are applicable to criminal cases tried in the District of New Jersey . . . L.Civ.R. 103.1 . . . .").

New Mexico

D. N.M. L.CIV.R. 83.9 ("The Rules of Professional Conduct adopted by the Supreme Court of the State of New Mexico apply except as otherwise provided by local rule or by Court order."); D. N.M. L.CRIM.R. 57.2 ("In all criminal proceedings, attorneys will comply with the Rules of Professional Conduct adopted by the Supreme Court of the State of New Mexico, unless modified by local rule or Court order.").

New York

S.D.N.Y. & E.D.N.Y. L.CIV.R. 1.5(b)(5) ("Discipline or other relief . . . may be imposed . . . if . . . [i]n connection with activities in this court, any attorney found to have engaged in conduct violative of the New York State Lawyer's Code of Professional Responsibility as adopted from time to time by the Appellate Divisions of the State of New York, and as interpreted and applied by the United States Supreme Court, the United States Court of Appeals for the Second Circuit, and this court."); S.D.N.Y. & E.D.N.Y. L.CRIM. R.1.1(b) ("In addition to these Local Criminal Rules, Local Civil Rules 1.2 through 1.10 . . . apply in criminal proceedings.").

N.D.N.Y. L. R. 83.4(j) ("The Court shall enforce the N.Y.S. Lawyer's Code of Professional Responsibilities, as adopted from time to time by the Appellate Division of the State of New York and as interpreted and applied by the United States Court of Appeals for the Second Circuit.").

W.D.N.Y. L.CIV.P.R. 83.1(b)(6) (Each applicant for admission is required to submit "a verified petition for admission stating . . . that the applicant agrees to adhere faithfully to the New York State Lawyer's Code of Professional Responsibility as adopted from time to time by the Appellate Divisions of the State of New York."); W.D.N.Y. L.CRIM.P.R. 57.2 ("All rules related to attorney admission to practice, attorneys of record, discipline of attorneys, student practice and student law clerks are found in Local Rules of Civil Procedure 83.1, 83.2, 83.3, 83.6 and 83.7, all of which are incorporated by reference into these Local Rules of Criminal Procedure.").

North Carolina

U.S. DIST. CT. R. E.D.N.C., CIV. R. 83.1(j) ("The ethical standard governing the practice of law in this court are the Revised Rules of Professional Conduct, now in force and as hereafter modified by the Supreme Court of North Carolina, except as may be otherwise provided by specific rule of this court."); U.S. DIST. CT. R. E.D. N.C., CRIM. R. 57.1(j) (same).

M.D.N.C. L. R. CIV.P. L. R. 83.10e(b) ("The Code of Professional Responsibility adopted by this court is the Code of Professional Responsibility adopted by the Supreme Court of North Carolina, as amended from time to time by that state court, except as otherwise provided by a specific rule of this court.").

W.D.N.C. L. R.83.1(c) (by making an appearance, counsel representing governmental or tribal agencies "agrees to abide by the Local Rules, the North Carolina Rules of Professional Conduct, and to submit themselves to this Court for the enforcement of such rules.").

Ohio

N.D. OHIO L.CIV.R. 83.7(a) ("Attorneys admitted to practice in this Court shall be bound by the ethical standards of the *Ohio Rules of Professional Conduct* adopted by the Supreme Court of the State of Ohio, so far as they are not inconsistent with federal law . . . .").

S.D. OHIO L. R., ORDER 81-1, MODEL F.R. OF DISC. ENF. IVB ("The Rules of Professional Conduct adopted by this court are the Rules of Professional Conduct adopted by the highest court of the state in which this Court sits, as amended from time to time by that state court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives or bar associations within the state.").

Oklahoma

E.D. OKLA. L.CIV.R. 83.7(a) ("Attorneys practicing in this Court are expected to conduct themselves in accordance with the Oklahoma Rules of Professional Conduct, as adopted by the Oklahoma Supreme Court, as the standard of conduct of all members of the Oklahoma Bar Association."); E.D. OKLA. L.CRIM.R. 1.2 ("When appropriate in a criminal context, the Local Rules of Civil Procedure are also deemed applicable to criminal cases.").

N.D. OKLA. L.CIV.R. 83.7(a) ("Attorneys practicing in this Court are expected to conduct themselves in accordance with the Oklahoma Rules of Professional Conduct, as adopted by the Oklahoma Supreme Court, as the standard of conduct of all members of the Oklahoma Bar Association.").

W.D. OKLA. L.CIV.R. 83.6(b) ("The Court adopts the Oklahoma Rules of Professional Conduct as adopted and amended from time to time by the Supreme Court of Oklahoma as the standard governing attorney conduct in this Court."); W.D. OKLA. L.CRIM.R. 57.2(a) ("The provisions of . . . LCvR83.6 Discipline by the Court, are applicable to these local criminal rules and are not repeated.").

Oregon

U.S. DIST. CT. R. D. OR. CIV.L. R. 83.7(a) ("Every attorney admitted to general or special practice and every law student appearing pursuant to L. R. 83.5 must . . . [b]e familiar and comply with the standards of professional conduct required of members of the Oregon State Bar and this Court's Statement of Professionalism.").

Pennsylvania

E.D. PA. L.CIV.R. 83.6, R. IV.B. ("The Rules of Professional Conduct adopted by this court are the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania, as amended from time to time by that state court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives of bar associations within the state . . . ."); E.D. PA. L.CRIM.R. 1.2 ("The following Local Civil Rules shall be fully applicable in all criminal proceedings . . . Rule 83.6 . . . .").

M.D. PA. L. R. 83.23.2 ("The Rules of Professional Conduct adopted by this court are: (1) the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania, except Rule 3.10, as amended from time to time by that court, unless specifically excepted in this court's rules; and (2) the Code of Professional Conduct enacted in the Middle District of Pennsylvania's Civil Justice Reform Act Plan.").

W.D. PA. L.CIV.R. 83.3.1(B) ("The rules of professional conduct adopted by this court are the rules of professional conduct adopted by the Supreme Court of Pennsylvania, as amended from time to time by the state court . . . and as otherwise provided by specific order of this court.").

Rhode Island

U.S. DIST. CT. R.I. GEN. 208(a) ("The Standards of Professional Conduct for attorneys appearing and/or practicing before this Court shall be the Rules of Professional Conduct as adopted by the Rhode Island Supreme Court, as the same may from time to time be amended, and any standards of conduct set forth in these Rules.").

South Carolina

U.S. DIST. CT. R. D. S.C., R. DISC. ENFORCEMENT IV(B) ("The Code of Professional Responsibility adopted by this Court is the South Carolina Rules of Professional Conduct (Rule 407 of the South Carolina Appellate Court Rules) adopted by the Supreme Court of the State of South Carolina, as amended from time to time by that state court, except as otherwise provided by specific Rule of this Court.").

Tennessee

E.D. TENN. L. R. 83.6 ("The Rules of Professional Conduct adopted by the Supreme Court of Tennessee is hereby adopted as rules of professional conduct insofar as they relate to matters within the jurisdiction of this court.").

U.S. DIST. CT. R. M.D. TENN., L. R. 83.01(e)(4) ("The standard of professional conduct of the members of the bar of this Court shall include the current *Tennessee Code of Professional Responsibility, Tenn. Sup. Ct. R. 8.*").

W.D. TENN. L.CIV. R., L. R. 83.1(e) ("All attorneys practicing before the United States District Court for the Western District of Tennessee shall comply with the Code of Professional Responsibility as then currently promulgated and amended by the Supreme Court of Tennessee . . . and with the Guidelines for Professional Courtesy and Conduct as adopted by this court.").

Texas

E.D. TEX. L. R. AT-2(a) ("The standards of professional conduct adopted as part of the Rules Governing the State Bar of Texas shall serve as a guide governing the obligations and responsibilities of all attorneys appearing in this Court. It is recognized, however, that no set of rules may be framed which will particularize all the duties of the attorney in the varying phases of litigation or in all the relations of professional life. Therefore, the attorney practicing in this Court should be familiar with the duties and obligations imposed upon members of this Bar by the Texas Disciplinary Rules of Professional Conduct, court decisions, statutes, and the usages customs and practices of this Bar.").

N.D. TEX. L.CIV.R. 83.8(E) & L.CRIM.R. 57.8(e) ("The term 'unethical behavior,' as used in this rule, means conduct undertaken in or related to a civil action in this court that violates the Texas Disciplinary Rules of Professional Conduct.").

S.D. TEX. L. R., APP. A, R. 1(A) ("Lawyers who practice before this court are required to act as mature and responsible professionals, and the minimum standard of practice shall be the Texas Disciplinary Rules of Professional Conduct.").

U.S. DIST. CT. W.D. TEX. L. R. AT-7(a) ("Members of the bar of this Court and any attorney permitted to practice before this Court must comply with the standards of professional conduct set out in the Texas

Disciplinary Rules of Professional Conduct . . . which are hereby adopted as the standards of professional conduct of this Court. This specification is not exhaustive of the standards of professional conduct. For matters not covered by the Texas rules, the American Bar Association's Model Rules of Professional Conduct should be consulted.").

Utah

D. UTAH CIV.R. 83-1.1(g) ("All attorneys practicing before this court, whether admitted as members of the bar of this court, admitted pro hac vice, or otherwise as ordered by this court, are governed by and must comply with the rules of practice adopted by this court, and unless otherwise provided by these rules, with the Utah Rules of Professional Conduct, as revised and amended and as interpreted by this court."); *see also* D. UTAH R. OF PRACT., ATTY. DISC. ("All attorneys practicing before this Court must comply with the rules of practice adopted by this Court and the Utah Rules of Professional Conduct, as revised and interpreted by this Court.").

Vermont

U.S. DIST. CT. R. D. VT., L. R. 83.2 (d)(4)(B) ("The Code of Professional Responsibility or Rules of Professional Conduct adopted by this court is the Code of Professional Responsibility or Rules of Professional Conduct adopted by the highest court of the state in which this court sits, as amended from time to time by that state court, except as otherwise provided by specific rule of this court after consideration of comments by representatives of Bar Associations within the state and other interested parties.").

Virginia

U.S. DIST. CT. E.D. VA. L.CIV.R. 83.1(I) ("The ethical standards relating to the practice of law in civil cases in this Court shall be the Virginia Rules of Professional Conduct . . . ."); U.S. DIST. CT. E.D. VA., L.CR.R. 57.4(I) (same).

U.S. DIST. CT. R. W.D. VA., DISC. R. IV(B)(1) ("The Code of Professional Responsibility adopted by the Virginia Supreme Court, as amended from time to time by that court and to the extent not in conflict with federal law, shall be the disciplinary rules of this Court, except as otherwise provided by specific Rule of this Court after specific consideration of comments by representatives of bar associations within the state.").

Washington

2009 WASH. CT. ORDER 5906, E.D. WASH. R. 83.3(a) ("This Court may impose discipline on any attorney practicing before this Court, whether or not a member of the bar of this Court, who engages in conduct violating applicable Rules of Professional Conduct of the Washington State Bar, or who fails to comply with rules or orders of this Court.").

W.D. WASH. GEN. R. 2(e) ("In order to maintain the effective administration of justice and the integrity of the Court, attorneys appearing in this District shall be familiar with and comply with the following materials ('Materials'): (1) The Local Rules of this District, including the Local Rules that address attorney conduct and discipline; (2) The Washington Rules of Professional Conduct, as promulgated, amended, and interpreted by the Washington State Supreme Court (the 'RPC'), and the decisions of any court applicable thereto; (3) The Federal Rules of Civil and Criminal Procedure; (4) The General Orders of the Court.").

West Virginia

N.D. W.VA. L. R. GEN. P. 84.01 ("In all appearances, actions and proceedings within the jurisdiction of this Court, attorneys shall conduct themselves in accordance with the Rules of Professional Conduct and the Standards of Professional Conduct adopted by the Supreme Court of Appeals of West Virginia, and the Model Rules of Professional Conduct published by the American Bar Association, and shall be subject to the statutes, rules and orders applicable to the procedures and practice of law in this Court. These rules provide minimal standards for the conduct of attorneys and the Court encourages attorneys to conform their conduct to the highest ethical standards.").

U.S. DIST. CT. R. S.D. W.VA., L. R. CIV. P. 83.7 ("In all appearances, actions and proceedings within the jurisdiction of this court, attorneys shall conduct themselves in accordance with the Rules of Professional Conduct and the Standards of Professional Conduct promulgated and adopted by the Supreme Court of Appeals of West Virginia, and the Model Rules of Professional Conduct published by the American Bar Association. Judicial officers of this court must comply with the Code of Conduct for United States Judges adopted by the Judicial Conference of the United States; judiciary employees of this court must comply with the Code of Conduct for Judicial Employees, also adopted by the Judicial Conference.").

Wisconsin

E.D. WIS. GEN. L. R. 83.10(a) ("The standards of conduct of the members of the bar of this Court, of government attorneys, and of nonresident attorneys admitted to practice before this Court must be those prescribed by the Rules of Professional Conduct for Attorneys, SCR:20: 1.1-8.5, as such may be adopted from time to time by the Supreme Court of Wisconsin and except as such may be modified by this Court.").

Wyoming

D. WYO. L. R., CIV.R. 83.12.7(b) ("The Rules of Professional Conduct adopted by this Court are the Rules of Professional Conduct adopted by the highest court of the state in which this Court sits, as amended from time-to-time by that state court, except as otherwise provided by specific rule of this Court after consideration of comments by representatives of bar association within the state."); D. WYO. L. R., L.CR.R.1.2 ("When appropriate in a criminal context, the Local Rules of Civil Procedure are also deemed applicable in criminal cases.").

District Courts That Do Not Adopt State Ethical Rules and/or ABA Model Rules

Nebraska

D. NEB. GEN. R. 1.7(B)(2) ("Counsel must refrain from conduct unbecoming of a member of the Bar. (A) This court declines to adopt other codes of professional responsibility or ethics. (B) However, and in addition to any other material, the court may consult other codes of professional responsibility or ethics to determine whether a lawyer has engaged in conduct unbecoming of a member of the bar.").

North Dakota

D. N.D. L. R. 1.3(H)(2) (Stating "[w]here it is shown to the court that any attorney admitted to practice before this court may have . . . breached standards of professional conduct, the court may enter an order requiring the attorney to appear before the court and show good cause why that attorney should not be suspended or disbarred from practice before the court," but not explicitly adopting any standards of professional conduct).

South Dakota

D.S.D. LOCAL R. 83.2(G)(4) (Stating "[i]f . . . the United States Attorney shall be of the opinion that there has been a breach of professional ethics by a member of this Bar, the United States Attorney . . . shall file and prosecute a petition requesting that the alleged offender be subjected to appropriate discipline," but not explicitly adopting any standards of professional conduct).

Wisconsin

W.D. WIS. L. R. 83.5 ("The local rules do not adopt rules of professional conduct for members of the bar of the court.").

PETITION FOR RE-HEARING

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Supreme Court, U.S.
FILED
JUN 22 2009
OFFICE OF THE CLERK

No. 07-1529

In The Supreme Court of The United States

JESSE JAY MONTEJO,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

PETITION FOR REHEARING

THIS IS A CAPITAL CASE

G. BEN COHEN
Counsel of Record
JELPI P. PICOU, JR.
ROBERT J. SMITH
BIDISH J. SARMA
THE CAPITAL APPEALS
PROJECT
636 Baronne Street
New Orleans, LA 70113

Counsel for Petitioner

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

PETITION FOR REHEARING

Petitioner Jesse Jay Montejo respectfully petitions for rehearing of the Court's May 26, 2009 decision.

GROUNDS FOR REHEARING

1. The Court should order rehearing in light of *Kansas v. Ventris*, No. 07-1356 (U.S. April 29, 2009), which decided an important Sixth Amendment question material to the outcome of this case. Since both the briefing schedule (including supplemental briefing) and oral argument had been completed, neither party had the opportunity to brief what effect the decision in *Ventris* has on the question of whether *Michigan v. Jackson* should be overruled.[1] Because *Ventris* reshaped the existing Sixth Amendment jurisprudential landscape[2] by holding

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[1] Oral arguments in *Montejo* were heard on January 13, 2009. On March 30, 2009, the Court ordered supplemental briefing on the question of whether *Michigan v. Jackson*, 475 U.S. 625 (1986) should be overruled. The supplemental briefing schedule was completed on April 24, 2009, without oral argument. On April 29, 2009 this Court issued its opinion in *Ventris*; on May 26, 2009, the Court issued the decision in *Montejo*.

[2] The Court's Sixth Amendment jurisprudence has long suggested that a defendant's right to counsel is not violated at the time his statement is taken outside the presence of counsel. Instead, the violation was thought to occur when the State actually introduced the uncounseled statement against the defendant at trial. *See Massiah v. United States*, 377 U.S. 201, 206 (1964) ("the petitioner was denied the basic protections of that guarantee when there was used against, him *at his trial* evidence of his own incriminating words.") (emphasis added); *see also* Stephen J. Schulhofer, *Confessions and the Court*, 79 Mich.L.Rev. 865, 889 (1981) ("Rather, *Massiah* explicitly

that the "Assistance of Counsel" encompasses the "right to be free of uncounseled interrogation, and is infringed *at the time of the interrogation* (rather than at the time the statement is introduced at trial)," rehearing is warranted to determine what impact the decision in that case has on the proper resolution here. The issue was never fully briefed or considered by this Court.[3]

2. The Court's decision in this case appears to be premised on the view that the introduction of the statement at trial is the gravamen of the Sixth Amendment violation: "The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled." *Montejo*, No. 07-1529, slip op. at 7. After *Ventris*, however, it is unclear why an offense-specific communication between the police and a represented defendant (especially one that did not

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permits government efforts to obtain information from an indicted suspect, so long as that information is not used 'as evidence against him at his trial.' . . . [I] it is the admission at trial that in itself denies the constitutional right." (internal citation omitted)); Brief For The United States in *Michigan v. Harvey*, 494 U.S. 344 (1990), at 25 (citing *Massiah*, 377 U.S. at 206) ("It is thus the use of the evidence for trial, not the method of its collection prior to trial, that is the gravamen of the Sixth Amendment claim." *Harvey*, 494 U.S. at 363 (Stevens, J. dissenting).

[3] It is significant to consider in determining whether rehearing is warranted that at both the petition stage, and the merits stage, neither the State, nor the Louisiana Supreme Court, suggested overturning *Michigan v. Jackson*. The issue was never subject to full oral argument. As such, the need for consistency in the application of the Sixth Amendment was not fully addressed.

begin with a *Miranda* warning) would not rise to the level of a constitutional violation. This question reflects an inevitable inconsistency between *Montejo* and *Ventris*, and it should not be resolved for the first time by the Louisiana Supreme Court on remand from this Court. Instead, the Court should grant rehearing and set this case for argument.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

G. BEN COHEN
Counsel of Record
JELPI P. PICOU, JR.
ROBERT J. SMITH
BIDISH J. SARMA
THE CAPITAL APPEALS
PROJECT
636 Baronne Street
New Orleans, LA 70113

Counsel for Petitioner